

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 324/MP/2018

&

Petition No. 325/MP/2018

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 8th of November, 2019

Petition No. 324/MP/2018

In the matter of

Petition filed under Section 79 (1) (b) of the Electricity Act, 2003 read with Article 7(2) (b) of the Power Purchase Agreement dated 26.12.2005.

And

And in the matter of:

Udupi Power Corporation Ltd.
1st Floor, Lotus Towers,
Devaraja Urs Road,
Race Course, Bangalore

Petitioner

Vs

1) Power Company of Karnataka Ltd
KPTCL Building, Kaveri Bhavan,
K.G.Road, Bengaluru – 560009

Respondent No. 1

2) Gulbarga Electric Supply Company Ltd
Station Main Road,
Gulbarga -585102

Respondent No. 2

3) Hubli Electric Supply Company Ltd
Corporate Office Road,
Gulbarga -585102

Respondent No. 3

4) Chamundeshwari Electric Supply Corporation Ltd
No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd stage, Hinkal
Mysore -570017

Respondent No.4



Petition No. 325/MP/2018

In the matter of

Petition under Section 142 read with Section 79(1)(b) and (f) of the Electricity Act, 2003 read with Article 7.2(b) of the Power Purchase Agreement dated 26.12.2005.

And in the matter of:

Udupi Power Corporation Ltd.
1st Floor, Lotus Towers,
Devaraja Urs Road,
Race Course, Bangalore

Petitioner

Vs

1) Power Company of Karnataka Ltd
KPTCL Building, Kaveri Bhavan,
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No. 29, Kaveri Grameena Bank Road,
Vijayanagara 2nd stage, Hinkal
Mysore -570017

Respondent No. 4

5) Bangalore Electric Supply Company Ltd
K.R.Circle,
Bengaluru – 560009

Respondent No. 5

6) Mangalore Electric Supply Company Ltd
Corporate Office, MESCOM Bhavan, First Floor,
Kavoor Cross Road, Bijai
Mangalore -575004

Respondent No. 6

Parties present:

Shri Amit Kapur, Advocate, UPCL
Ms. Abiha Zaidi, Advocate, UPCL
Shri Amit Mittal, UPCL
Shri Harish Priyani, UPCL
Shri Saunak Rajguru, UPCL
Shri M.G. Ramachandran, Senior Advocate, PCKL
Ms. Tanya Sareen, Advocate, PCKL
Shri Shikhar Saha, Advocate, PCKL



Shri Arunav Patnaik, Advocate, PCKL
Ms. Chithravathy, PCKL
Shri Balaji Srinivasan, Advocate, BESCO
Ms. Pallavi Sengupta, Advocate, BESCO

ORDER

Two petitions, 324/MP/2018 and 325/MP/2018, have been filed by the Petitioner, Udupi Power Corporation Ltd. (hereinafter also referred to as "UPCL") seeking directions to the Respondents to make payment for the outstanding amount towards regular bills and infirm power invoices along with the applicable late payment surcharge as prayed for in the Petitions. Since both Petitions are related to late payment surcharge under the same PPA, they were heard together and, accordingly, both petitions are disposed of through this common order.

2. In the Petitions, the Petitioner has sought directions to the Distribution Companies of the State of Karnataka i.e. Gulbarga Electric Supply Company Ltd. (Respondent No. 2), Hubli Electric Supply Company Ltd. (Respondent No. 3), Chamundeshwari Electric Supply Corporation Ltd. (Respondent No. 4), Bangalore Electric Supply Company Ltd. (Respondent No. 5) and Mangalore Electric Supply Company Ltd. (Respondent No. 6)(hereinafter collectively referred to as "KESCOMs") to make payment towards Late Payment Surcharge ("hereinafter referred to as LPS") along with interest for: -

(a) Invoices raised towards monthly bills for power supplied from 11.11.2010 (COD of Unit I) and from 19.08.2012 (COD for Unit II) till date which is the subject matter of Petition No. 324/MP/2018 against Gulbarga Electricity Supply Company Ltd. (hereinafter referred to as "GESCOM"), Hubli Electricity Supply Company Ltd. ("hereinafter referred to as HESCO") and Chamundeswari Electricity Supply Corporation Ltd. ("hereinafter referred to as CESCO").

(b) Invoices raised for 495.50 MU infirm power supplied from 03.06.2010 to 11.11.2010 from Unit I and 384.14 MU supplied from 07.03.2011 to 19.08.2012



from Unit II, i.e., a total of 879.67 MU that remain unpaid which is the subject matter of Petition No. 325/MP/2018 against GESCOM, HESCOM, CESCO, Bangalore Electricity Supply Company Ltd. ("BESCOM") and Mangalore Electricity Supply Company Ltd. ("MESCOM").

Background of the case

I. Petition No. 324/MP/2018

3. On 10.12.2004, the Petitioner, the erstwhile Nagarjuna Power Corporation Limited (NPCL) approached the Government of Karnataka ("GoK") offering to supply electricity from Udupi Thermal Power Project proposed to be set up with a capacity of 1,015 MW (2x 507.5 MW). NPCL had filed a Petition before this Commission seeking in-principle approval of the capital cost of the project for generation and sale of electricity to the KESCOMs and Punjab State Power Corporation Ltd. The Commission in its Order dated 25.10.2005 in Petition No. 40/2005 accorded 'in-principle' approval to the capital cost of the project with a capacity of 1,015 MW at Rs.4,299.12 Crore inclusive of the Interest during Construction ("IDC").

4. Thereafter, on 26.12.2005, a Power Purchase Agreement ("PPA") was executed between NPCL and the KESCOMS for supply of 90% of power generated from its Udupi Plant.

5. On 08.02.2008, NPCL was renamed as Udupi Power Corporation Limited and a "Certificate of Incorporation Consequent upon Change of Name" was issued by the Ministry of Corporate Affairs.

6. On 29.07.2008, NPCL approached the GoK and the KESCOMS for approval for enhancement of capacity for the project from 1,015 MW to 1,500 MW and to provide power generation from the increased capacity to KESCOMs. NPCL on the basis of



revision in the capacity of Power sought revision in the capital cost of the project.

7. On 03.02.2009, the GoK gave in-principle approval for expansion of capacity of the Project from 1,015 MW to 1,500 MW subject to certain conditions.

8. On 23.09.2010, the GoK set up a committee under the chairmanship of Justice (Retd.) Gururajan to examine the enhancement of capital cost of the Project due to enhancement of capacity.

9. On 25.10.2010, GoK enhanced the capacity of the Project from 1,015 MW to 1,200 MW and agreed for increase in the capital cost of the project by Rs. 583.85 Crore, excluding IDC, subject to the approval of this Commission.

10. On 10.11.2010, PCKL vide its letter to the Petitioner intimated that pursuant to GoK's approval of enhancement of the Project capacity on 25.10.2010, the interim/provisional tariff for 1,200 MW works out to Rs. 3.127/unit.

11. Based on the aforesaid communication, the Petitioner raised invoices on the KESCOMS for supply of power for the period from 11.11.2010 to 30.11.2011. On 01.12.2011, the Petitioner filed tariff petition before this Commission for determination of tariff for the period from 11.11.2010 to 31.03.2014 for Unit-I and from 01.04.2012 to 31.03.2014 for Unit-II.

12. In the meanwhile, the Petitioner also raised invoices on the KESCOMS for the billing period of December 2011 to January 2014, i.e., from 01.12.2011 to 31.01.2014, based on the Annual Fixed Charges ("AFC") as claimed in the Tariff Petition. The Commission *vide* its Order dated 20.2.2014 in Petition No. 160/GT/2012 determined the Tariff for the Udupi Thermal Power Station (2 x 600MW) in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff)



Regulations, 2009 (hereinafter referred to as the “2009 Tariff Regulations”) for the Period 11.11.2010 to 31.03.2014.

13. Consequently, the Petitioner sent to the KESCOMs, the revised invoices for the billing period 11.11.2010 to 31.01.2014. The Petitioner also raised invoices for the subsequent billing period of February 2014 to July 2015, i.e., from 01.02.2014 to 31.07.2015. The Petitioner has placed on record a sample invoice for the billing month February 2014 and a chart showing billing details for the months February 2014 to July 2015.(Annexures 8 & 9 of the petition).

14. Aggrieved by certain findings of this Commission’s Order dated 20.02.2014 in Petition No. 160/GT/2012, the KESCOMS and the Petitioner filed Cross Appeals (Appeal No. 108 of 2014 and Appeal No. 119 of 2014 respectively) before the Appellate Tribunal for Electricity (APTEL). The Cross Appeals were heard together and were disposed of by APTEL *vide* Judgment dated 15.05.2015.

15. Subsequent thereto, based on APTEL’s Judgment dated 15.05.2015, this Commission revised the tariff *vide* its Order dated 10.07.2015 in Petition No. 160/GT/2012.

16. In accordance thereof, the Petitioner raised revised invoice for the billing period from August 2015 to March 2016 i.e. from 01.08.2015 till 31.03.2016.

17. The Petitioner raised revised invoices for the billing period April 2016 to March 2017 i.e. from 01.04.2016 till 31.03.2017. It is stated by the Petitioner that in the said invoices, the Petitioner reduced the approved AFC by the approved amount towards Secondary Fuel Oil Consumption (SFOC) for the period 2013-14 since as per Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014



(hereinafter referred to as the 2014 Tariff Regulations), SFOC is not a part of AFC.

18. On 11.01.2016, the Petitioner filed truing-up Petition No. 07/GT/2016 for the period from 11.11.2010 to 31.03.2014 and the truing up Order was issued by this Commission on 24.03.2017. In accordance thereof, the Petitioner has been raising invoices based on the AFC approved in the Order dated 24.03.2017 for the billing period April 2017 (01.04.2017) onwards till date.

19. The Petitioner, vide its letter dated 22.01.2018, raised supplementary invoices for Late Payment Surcharge (LPS) against the concerned KESCOMS (being GESCOM, HESCOM and CESCOM) for the period from 01.03.2011 to 05.01.2018 and in the said letter requested the concerned KESCOMS to fulfil their obligations under the PPA with respect to the payment towards LPS along with outstanding dues immediately in order to avoid further increase in the LPS.

20. The Petitioner sent several reminders to these KESCOMs along with incremental value of the LPS vide its letters on different dates. Few dates on which such reminders were sent are 31.01.2018, 02.02.2018, 10.02.2018, 17.02.2018, 01.03.2018, 10.03.2018, 17.03.2018, 02.04.2018, 10.04.2018, 17.04.2018, 01.05.2018, 10.05.2018, 17.05.2018 and 01.06.2018. However, as per the Petitioner, these KESCOMS have not paid any amount towards LPS till date.

21. GESCOM vide its letter dated 01.09.2018 replied that Late Payment Surcharge (LPS) on regular bills is not payable in view of the APTEL's judgment dated 24.01.2013 in Appeal No. 82 of 2012 and 90 of 2012 which states that interest can be charged only after determination of final tariff in accordance with regulation 5(4) of the 2009 Tariff Regulations.



22. In its response to GESCOM's letter dated 01.09.2018, the Petitioner, *vide* its letter dated 14.09.2018 clarified that the 2009 Tariff Regulations clearly provide for different provisions for carrying cost and Late Payment Surcharge. The Petitioner has submitted that an amount of Rs.911 crore towards late payment surcharge is outstanding against HESCOM, GESCOM and CESCO.

23. Aggrieved by the letter dated 01.09.2018 from Respondent No. 2 and due to non-payment of the amounts due by the Respondent KESCOMs which has resulted in escalation of outstanding amounts over a period of time, the Petitioner has approached this Commission by way of the present petition Seeking directions to these Respondents to make payment of the outstanding amount towards late payment surcharge alongwith interest.

II. Petition No. 325/MP/2018

24. The Petitioner has submitted that the 1st Unit of its generating station was synchronised in June 2010 and achieved COD on 11.11.2010 and the 2nd Unit was synchronised in March 2011 and achieved its COD on 19.8.2012. The Petitioner supplied infirm power from the ESCOMs for the period June 2010 to 10.11.2010 from Unit 1 and from March 2011 till 18.8.2012 from Unit 2 of its generating station. The Petitioner raised 13 monthly invoices for infirm power during these periods aggregating to a claim of Rs. 245.39 Crore.

25. On 26.06.2014, the Petitioner *vide* its letter to GoK highlighted the difficulties being faced in the operations of the plant due to non-realization of invoices. The Petitioner sought support of GoK in release of outstanding payment of Rs. 116.82 Crore towards infirm power with interest for delay. Thereafter, the Petitioner followed up *vide* letters dated 9.1.2015, 16.01.2015 and 10.02.2015.



26. The Petitioner sent reminder letter dated 24.01.2018 to PCKL to make balance payment towards infirm power of Rs. 127.92 Crore as per this Commission's Order dated 24.03.2017 in Petition No. 07/GT/2016. This was followed up by reminders with incremental value of Late Payment Surcharge dated 31.01.2018, 02.02.2018, 10.02.2018, 17.02.2018, 01.03.2018, 10.03.2018, 02.04.2018, 01.05.2018 and 01.06.2018.

27. On 31.01.2018, the Petitioner requested PCKL to pay a total amount of Rs. 283.64 Crore on following accounts:-

- (i) Rs. 127.92 Crore towards infirm power (in accordance with CERC Order dated 24.03.2017); and
- (ii) Rs. 155.72 Crore (as on 23.01.2018) towards LPS on late payment of infirm power charges.

28. The Petitioner kept on raising revised bills through its various subsequent letters by including differential LPS.

29. On 27.03.2018, PCKL, vide its proforma for bill, admitted the Petitioner's claim of Rs. 127.92 Crore towards balance payment of infirm power charges injected by the Petitioner from June 2010 to November 2010 and from March 2011 to August 2012. Accordingly, PCKL issued directions for payment to the Petitioner.

30. On 30.04.2018, MESCOM made payment of Rs. 10,65,55,730/- outstanding towards infirm power charges. However, no payment was made towards LPS.

31. Vide letters dated 5.6.2018 and 20.7.2018/20.8.2018, PCKL stated that the claim of Rs. 164.60 Crore towards LPS shall not be payable by KESCOMS due to the following reasons:-



(a) The Petitioner is only entitled to payment towards infirm charges on basis of the actual fuel consumption. Accordingly, the Petitioner has been paid Rs. 104.07 Crore at the rate of Rs. 1.208/kWh.

(b) The bills towards balance payment of infirm power were received by PCKL on 24.01.2018. Accordingly, the Petitioner is not entitled to LPS before 24.01.2018.

32. On 17.09.2018, GESCOM made payment of Rs. 16,96,19,325/- outstanding towards infirm power. However, no payment was made by GESCOM towards LPS. Petitioner has submitted that PCKL is barred under Article 6.3(a) of the PPA from raising any dispute in respect of the Tariff Invoices at this stage of the proceedings, unless that dispute is communicated to the seller within ten business days of the acknowledgement date. Since PCKL has not invoked any such claim within the stipulated time, pursuant to Article 6.3(a) of the PPA, all monthly and supplementary invoices as raised by Udipi Power must be deemed to have been accepted by PCKL.

33. As per the Petitioner, the facts as stated above led to filing of the above two petitions on 1.10.2018. Both the petitions were listed for admission on 20.12.2018. Thereafter the two petitions were listed for hearing on 14.2.2019, 19.3.2019, 9.5.2019, 6.8.2019 and finally on 20.8.2019 where after hearing, the Commission reserved the orders.

Submissions of the Petitioner

34. Petitioner's claim for LPS is premised on Articles 6.3 and 6.4 of the Power Purchase Agreement ("PPA") dated 26.12.2005 executed between the parties for supply of 1,080 MW of power read with Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations. The relevant provisions of the PPA, the 2009 Tariff Regulations and the 2014 Tariff Regulations are as under-



(a) Definitions under Article 1.1

- *"Acknowledgement date" means the date on which receipt of a Tariff Invoice or a Supplementary Invoice is acknowledged by the Designated Officer of the Principal Buyers.*
- *"Billing month" means the period between any two consecutive Meter reading dates. The first billing month shall start from the Commercial Operation date and end with the next immediate Meter reading date.*
- *"Due date of payment" shall mean sixty days reckoned from the Acknowledgment Date, including the Acknowledgment date."*
- *"Tariff invoice" shall have the meaning set forth in Article 6 hereof.*

(b) Article 6.2, 6.3, 6.4 and 6.11

"6.2 Billing by the Seller

(a) The Seller shall submit to the Principal Buyers a Tariff Invoice for each Billing month setting forth those amounts payable by the Principal Buyers for Monthly Capacity (fixed) charge amount, Energy charges and Incentive payment wherever applicable. Along with each monthly bill, the Seller will submit documents as agreed between Principal Buyers and Seller.

(b) The Seller shall, if necessary, submit to the Principal Buyers Supplementary Invoices each month for any other payment not included in the Tariff invoice. Provided that no revision in respect of a Tariff invoice shall be included in a Supplementary invoice after one month of the expiry of the relevant Tariff period.

(c) Any Tariff Invoice or Supplementary Invoice shall specifically indicate the payments attributable to the Net metered energy. The Tariff invoice or Supplementary invoice shall be submitted to the Principal Buyers along with a covering letter in triplicate during Business hours on a Business day.

(d) The Designated officer of the Principal Buyers shall promptly acknowledge the receipt of the invoice and covering letter and indicate the date of receipt of the [invoice] on the duplicate and third copy of the covering letter and return to the Seller."

"6.3 Payment by the Principal Buyers

(a) The Principal Buyers shall communicate to the Seller and the Bank any dispute in respect of the Tariff invoice or the Supplementary invoice, within Ten Business days of the Acknowledgement date. If the Principal Buyers do not communicate to the Bank and the Seller any such dispute, it shall be construed as deemed acceptance by the Principal Buyers in respect of the entire amount of such invoice. The Principal Buyers will forward the invoice copy to the Bank for making payment to the Seller.

(b) In case the Principal Buyers communicates any dispute in respect of a Tariff invoice or a Supplementary invoice, both the Parties shall enter into good faith negotiations and resolve the same within thirty days of the Acknowledgement date. The Parties shall follow the process in Article 7.1 (a), (b) and (c) for resolving any dispute hereunder.

(c) Notwithstanding any dispute that may be raised under (a) above, the Principal Buyers shall pay the Seller the undisputed amount in respect of the



Tariff invoice or Supplementary invoice on or before the Due date of payment to a bank account designated in writing by the Seller.

(d) After settlement of dispute, if any amount becomes payable by the Seller to the Principle Buyers, then the same shall be paid within seven days.”

6.4 Interest on belated payment –

(a) Any payment, including payment in respect of disputed amounts, made by the Principal Buyers beyond the Due date of payment shall carry interest at the Default rate. Notwithstanding the foregoing, this does not give any right whatsoever to the Principal Buyers to delay payment and accordingly is without prejudice to any other remedy the Seller may have for late payment by the Principal Buyers.”

(b) All such interest shall accrue from day to day and shall be calculated on a 365-day year basis.

6.11 Order of Security

(a) The Seller shall present the Tariff invoice and any Supplementary invoice for direct payment by the Principal Buyers. If the Principal Buyers fails to pay the amount due in respect of such invoices by the Due date of payment, the Seller shall have recourse to the Letter of credit, without any rebate.”

(b) The above is without prejudice to any other right or remedy that the seller may have under this Agreement or any other Law in force.

(c) Regulation 35 of the 2009 Tariff Regulations -

“35. Late payment surcharge.

In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee, as the case may be.”

(d) Regulation 45 of the 2014 Tariff Regulations -

“45. Late payment surcharge:

In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary or long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.”

35. The Petitioner has submitted that since the Petitioner has performed its obligations under the PPA, it cannot be deprived of its legitimate entitlement. On account of the failure of the KESCOMs to pay against the legitimate invoices raised,



the Petitioner is entitled to LPS in terms of the PPA and the applicable CERC Tariff Regulations. In support, the Petitioner had relied upon the judgments of the Hon'ble Supreme Court in the matter of *State of Rajasthan vs. J.K. Synthetics Ltd.*, (2011) 12 SCC 518 and *Kanoria Chemicals and Industries Ltd. vs. U.P. SEB* (1997) 5 SCC 772.

36. The Petitioner has submitted that this Commission in its various Orders has allowed the LPS under the Tariff Regulations on the payment delayed for more than 60 days beyond the date of billing: -

(a) In Order dated 17.10.2017 in Petition No. 37/TT/2017 titled *PGCIL vs. Bihar State Power Holding Company & Ors.*, this Commission allowed LPS as under: -

"72. The petitioner has submitted that the claim for transmission charges and other charges is exclusive of incentive, late payment surcharge, FERV, any statutory taxes, levies, duties, cess, or any other kind of impositions etc. The same, if imposed shall be borne and additionally paid by the respondents. We have considered the submissions of the petitioner. The petitioner is entitled for late payment surcharge and FERV as per Regulations 45 and 50 respectively of the 2014 Tariff Regulations."

(b) In Order dated 27.11.2017 in Petition No. 132/MP/2017 titled *Tata Power Delhi Distribution Limited vs. NTPC Ltd.*, this Commission allowed LPS under Regulation 45 of the 2014 Tariff Regulations as under: -

"33. Further, Petitioner has also relied on provisions of Regulation 45 of the 2014 Tariff Regulations for billing by respondent NTPC stating that "60 days to beneficiary to pay Invoices from the date of billing. NTPC is entitled to late payment surcharge at the rate of 1.50% per month only after expiry of 60 days. As such any insistence of payment by NTPC prior to the expiry of sixty days is contrary to Regulation 45 of the 2014 Tariff Regulations."

37. The Petitioner has submitted that PCKL is barred under Article 6.3(a) of the PPA from raising any dispute in respect of the tariff invoices at this stage of the proceedings, unless that dispute is communicated to the Seller within ten business days of the acknowledgement date. Since PCKL has not invoked any such claim within the stipulated time, pursuant to Article 6.3(a) of the PPA, all monthly and



supplementary invoices raised by the Petitioner must be deemed to have been accepted by PCKL. It is submitted that the letters relied upon by the Petitioner shows that there was no delay and the Petitioner has followed the provision of the PPA.

38. The Petitioner has further submitted that the argument of PCKL that it is discharged from its obligation to make payments for power supplied due to delay by the Petitioner in raising LPS bills is wrong. It is incorrect on part of the Respondents to state that Article 6.2(b) of the PPA does not permit raising of Supplementary Invoices for any alleged dues that may have arisen more than a month prior to the date of the invoice. The counsel submitted that the Petitioner has all along regularly raised the bills against supply of power. Although no supplementary invoices were raised claiming LPS prior to January 2018, the Petitioner has been raising the claim of interest/ LPS since 2011 and that the Petitioner has a running account with the KESCOMs in which context, the Petitioner has kept the KESCOMs apprised of the LPS payable by them at the end of each financial year.

39. The Petitioner has submitted that neither the provisions of the PPA nor the CERC Tariff Regulations stipulate any specific methodology to claim LPS. The LPS claim cannot be frustrated by procedural technicalities. LPS is analogous to the 'interest accrued on delayed payments' and is claimed in terms of Article 6.4 of the PPA. In support, reliance was placed on the judgments of Hon'ble Supreme Court as regards using 'LPS' and 'interest' interchangeably viz., (i) *Consolidated Coffee Ltd. vs. Agricultural ITO* (2001) 1 SCC 278 and (ii) *State of Rajasthan vs. J.K. Synthetics Ltd.* (2011) 12 SCC 518. Article 6.4(a) of the PPA stipulates that interest 'shall' be levied at the 'Default Rate' in case payments are made by Principal Buyers beyond the Due Date. The non-obstante clause under Article 6.4(a) rules out any conferred right on the



Principal Buyers to delay the payments. The running account and a continuing nature of the relationship (commercial arrangement of 25 years) under the PPA lead to the continuing cause of action that is evidenced by Article 6.4(b) which clearly provides that “*all such interest shall accrue from day to day and shall be calculated on a 365 day year basis*”.

40. The Petitioner has submitted that the Petition pertains to an ongoing dispute for illegitimate withholding of dues by PCKL and that the LPS arising thereof, which is not barred by limitation. Counsel referred to the following in this regard: -

(a) Section 3 of the Limitation Act, 1963 which relates to ‘*Bar of Limitation*’ is subject to Section 22 of the Limitation Act, 1963 which specifically provides for breach of a continuing nature as an exception to the rule of limitation, viz.: -

“22. *Continuing Breaches and Torts- In case of a continuing breach of contract or in case of a continuous tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.*”

(b) Non-payment of regular monthly bills by the defaulting KESCOMs constitutes a ‘*continuing breach*’ of the PPA for the purposes of Section 22 of Limitation Act, 1963. This ‘*wrongful act/breach*’ of the KESCOMs resultantly is burdening the Petitioner with additional working capital interest, till it gets paid by the KESCOMs. This incremental ‘*continuing injury*’ caused to the Petitioner constitutes the ‘*wrongful act/breach*’ and a ‘*continuing wrong*’ under Section 22 of the Limitation Act, 1963. The Petitioner placed reliance on judgments of Hon’ble Supreme Court to support this submission viz. *Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Co. Ltd. & Anr.* (1997) 1 SCC 99 and *State of M.P. & Ors. vs. Yogendra Srivastava* (2010) 12 SCC 538.

41. The Petitioner has submitted that in view of the aforesaid, KESCOMs stand to benefit by such delayed payments and the same amounts to unjust enrichment. Hon’ble Supreme Court disallowed unjust enrichment of a party to the contract and reliance was placed by the Petitioner to the judgement in case of *Renusagar Power*



Co. Ltd. vs. General Electric Co. 1994 Supp (1) SCC 644 and *Mahabir Kishore vs. State of M.P.* (1989) 4 SCC 1.

42. The Petitioner has submitted that the rate of interest must be as applicable under the relevant CERC Tariff Regulations applicable to LPS. The CERC Tariff Regulations stipulate the interest rate applicable in case of delay in the payment beyond 60 days as 1.25% and 1.5% per month for the tariff period 2009-14 and 2014-19 respectively. This is in conformity with the law laid down in *PTC India Ltd. vs. CERC & Ors.* (2010) 4 SCC 603. Further, the invoices raised during provisional tariff period are valid invoices since: -

(a) The provisional tariff was fixed by PCKL itself pursuant to (i) the in-principle approval by GoK and ii) the recommendations of Justice (retd.) Gururanjan Committee.

(b) An arrangement between both parties pursuant to the direction of the government is a 'subsequent agreement' between the contracting parties. Accordingly, the terms of the PPA should be read in consonance with such subsequent arrangement.

43. The Petitioner has submitted that PCKL is misleading this Commission by contending that the issue concerning interest with respect to delayed payments has attained finality in (i) APTEL's judgment dated 15.05.2015 in Appeal Nos. 108, 119 and 122 of 2014 & No. 18 of 2013 and in (ii) this Commissions' Order dated 03.06.2014 in Review Petition No. 14/RP/2014. The counsel in this regard submitted that:-

(a) APTEL's judgment dated 15.05.2015 notes that the issue regarding interest on belated payments has been settled by this Commission in its Order dated 06.03.2014 in Petition No. 7/GT/2016 regarding interest on working capital and interest on loans. No finding was returned with respect to late payment surcharge on delayed payments.



(b) Regarding the Order of this Commission dated 03.06.2014 in Review Petition No. 14/RP/2014 in Petition No. 160/GT/2012, it was submitted that: -

(i) PCKL has wrongly quoted paragraph 13 of the said Order disregarding the fact that the finding does not relate to 'applicable interest'. The relevant observations of the said Order are reproduced below: -

"11. In addition to the above, it is noticed that the petitioner has prayed for further reliefs as under:

(i) Direction to the respondents to pay applicable interest as per Regulation 5(3) of the 2009 Tariff Regulations on the difference between the provisional tariff paid by the respondents and the tariff determined by impugned order;

(ii) Direction to the respondents to ensure that KPTCL enters into BPTA with PGCIL and also to direct respondents 7(PSPCL) to enter BPTA with KPTCL and PGCIL; Also to direct Respondents 2 to 6 to ensure that KPTCL enters into agreement for wheeling of power with PSPCL. Direct Respondent No.7 to enter into agreement with KPTCL for wheeling of power.

(iii) Direct Respondents 2 to 6 to provide to the petitioner Letter of Credit and Escrow facilities as payment security mechanism under the PPA based on tariff computed;

(iv) Direct Respondents to obtain appropriate clearance from the GoK to make necessary changes in the PPA as specified in the GoK guarantee

12. ...We have examined this matter. As regards the payment of applicable interest, the same is guided by the proviso to Regulation 5(3) of the 2009 Tariff Regulations, as amended on 21.06.2011..... The difference between the tariff provisionally billed and tariff initially determined is required to be adjusted in terms of the said proviso to Regulation 5(3) of the 2009 Tariff Regulations...

13. The reliefs prayed for by the Petitioner from clauses (ii) and (iv) in para 11 above do not fall within the scope and ambit of determination of tariff..."

(ii) The issue concerning 'applicable interest' was dealt in 'paragraph 12' of the Order dated 03.06.2014, whereas 'paragraph 13' of the same concerns with reliefs (ii) to (iv) as sought therein. Paragraph 12 of the said Order makes it clear that the Petitioner is entitled to carrying cost applicable to tariff differential between final tariff and provisional tariff. Therefore, PCKL's contention that the Petitioner's claim for interest has been expressly rejected by this Commission is mischievous and misleading. The issue under consideration in this Petition relates to default in payments within due dates, governed by Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations.

44. The Petitioner has pointed out that PCKL's contention of prospective application of tariff was previously raised in Petition No. 160/GT/2012 in the matter of Grant of Provisional tariff of Unit-I (600 MW) of Udupi Thermal Power Station for the period from 11.11.2010 to 31.3.2014 and was explicitly rejected by this Commission



by its Order dated 24.12.2012, which has since attained finality. PCKL is barred by the doctrine of *res judicata* from raising the same claim again. The relevant extract of this Commission's Order dated 24.12.2012 is provided hereinunder: -

"31. The Respondents 1 to 6 have submitted that the provisional tariff to be granted by the Commission should be prospective in operation. The counsel for the objectors have also submitted that the provisional tariff of the generating station may not be granted with retrospective effect as the Petition has been filed belatedly...The 2009 Tariff Regulations is applicable for the entire tariff period 2009-14. The petitioner and the respondents have agreed on the interim tariff rate of Rs. 3.127/kWh subject to the determination of final tariff by this Commission. That being the case, it is not proper for the respondents to take a contrary view that the tariff determined by the Commission will not have its application from the date of commercial operation. In our view, the tariff determined by this Commission shall be applicable from the date of Commercial Operation till the end of the tariff period."

45. The Petitioner in Petition No. 325/MP/2018 sought to justify that the liability to pay the dues has been upheld by this Commission against the KESCOMs on 24.03.2017 in Petition No. 07/GT/2016. Once so upheld, multiple communications were made to PCKL requesting it to issue necessary directions to the defaulting KESCOMs to pay the infirm power bills raised by the Petitioner. Since all follow-ups by the Petitioner were thwarted by the KESCOMs with no payments, the present petition was filed on 01.10.2018 to seek enforcement of the order dated 24.03.2017. The relevant observation of CERC's Order dated 24.03.2017 is as under:-

"19. In terms of the above regulation, the revenue earned (and not revenue realized) from sale of infirm power after accounting for fuel expenses shall be applied for reduction in capital cost. Accordingly, the plea of the petitioner to capitalize the unrecovered towards infirm power in the capital cost is not accepted. As regards withholding of payment of ₹ 127.92 crore by the respondent, Karnataka discoms towards infirm power, we direct the respondents to pay the same directly to the petitioner since, the supply of infirm power are to be accounted as UI in terms of the above regulations."

46. The Petitioner submitted that on 02.09.2014, PCKL, through its pro-forma dated 02.09.2014 (certified by SLDC), submitted to the Petitioner admitted total liability of Rs. 237.30 Crore (Rs. 119.71 Crore for Unit-I and Rs. 117.59 Crore for Unit-II). Of the admitted liability, the KESCOMs paid an amount of Rs. 114.05 Crore. The counsel submitted that on 27.03.2018, PCKL *vide* its proforma bill, admitted the Petitioner's



claim of Rs. 127.92 Crore towards balance payment of infirm power. Subsequently, the KESCOMs made the balance payments towards infirm power bills. However, no payments were made by the KESCOMs towards the LPS on such delayed payments of the infirm power bills.

47. The Petitioner laid emphasis on the Petitioner's entitlement to LPS along with the interest accruing on the non-payments by the KESCOMs on the basis of Article 2.A.4.6 of the PPA dated 26.12.2005 and the provisions of the applicable Tariff Regulations of the Commission.

48. The Petitioner submitted that the so-called delay in raising invoices by the Petitioner with respect to LPS/interest until January 2018 will not discharge the KESCOMs from their obligation to make payments for power supplied, consumed and against which tariff has been charged from consumers. If this is allowed, PCKL shall be guilty of unjust enrichment.

49. Reliance was placed by the Petitioner on the judgment of the APTEL dated 17.04.2012 in Appeal No. 11 of 2012 titled *The Chairman, Tamil Nadu E.B. (Now Tamil Nadu Generation and Distribution Corporation Ltd.) vs. M/s Indian Wind Power Association & Ors.* wherein while dealing with a case bereft of even any contractual stipulations relating to late payments, set out the rationale for compensating the generators for delayed payment as under: -

"16. In the present case, even though there is no express stipulation with regard to the interest, as pointed out by the Commission, the Commission has invoked the powers, as provided in the relevant sections of CPC to order the same. In the light of the various principles regarding the grant of interest laid down by the Supreme Court in the case of Secretary, Irrigation Department, Government of Orissa Vs G.C. Roy reported in 1992 Vol.1 SCC 508, the Respondent Wind Power Generators are entitled to receive interest on the admitted delayed payment.

17. In any power project, one of the important aspects is promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organisations require regular repayment of principal loan amount with interest by the generators. Only



if regular payments are made for the power generated and supplied, the loans can be serviced long with the promised return of investment.”

50. The Petitioner submitted that PCKL has wrongly contended that the Petitioner's claim for LPS is barred by *res judicata* since interest was disallowed by this Commission's Order dated 20.02.2014 in Petition No. 160/GT/2012 and Order dated 24.03.2017 in Petition No. 7/GT/2016. The counsel submitted that the Petitioner in its Tariff Petition No. 160/GT/2012 filed in 01.12.2011 specifically prayed for payment towards infirm power from the date of synchronization along with applicable interest as per the Regulation 6(5) of the 2009 Tariff Regulations. This Commission did not make any observation regarding the same in its Order dated 20.02.2014 in Petition No. 160/GT/2012. Similarly, though relief was sought with respect to 'carrying cost', this Commission did not make any observation regarding the same in its Order dated 24.03.2017 in Petition No. 7/GT/2016. It was also submitted that when an issue is raised but not decided, it does not operate as *res judicata*. Therefore, the issue was neither 'specifically dealt with' nor 'decided' and thus cannot be claimed to have attained finality so as to attract Section 11 of the Code of Civil Procedure, 1908. It was mentioned that a relief stands rejected if the Order is silent on such aspect. Instead, if the substantial claim stands accepted, and there is no mention about the ancillary claim, the said relief should be deemed to have been granted. In this regard, reliance was placed on the judgment of the Hon'ble Supreme Court in *P.V.G. Raju Garu vs. State of Andhra Pradesh*, (1990) 2 SCC 61, wherein it was observed as under: -

“8. *The contention that because the Tribunal had not reiterated the word 'interest' in the next sentence of its direction and had only mentioned "the amount" payment under the TOPs and, therefore, it should be held that the Tribunal had rejected the claim for interest is too facile to be accepted. For the same reason, we are also not impressed by the argument that since the Tribunal had while directing the payment of specific amounts only referred to a part of the principal amounts it should be held that the Tribunal had rejected the claim for interest.the government had not only claimed the balance of the principal amounts but also interest on the entire of the said amounts from July 1, 1949. The High Court was, therefore, right in holding that the Tribunal by its order of December 15, 1962 had allowed the claim for interest. In the circumstances, the issue*



with regard to the claim for interest in the subsequent applications, namely, applications TOPs 5/69 and 6/69 was not barred by res judicata, as contended by Shri Bhandare.”

51. It was submitted by the Petitioner that PCKL in its Reply has misconstrued carrying cost claimed in Petition No. 7/GT/2016 as ‘interest claimed over delayed payments towards infirm power’. The scope of the Petitioner’s prayer in the said Petition was limited to carrying cost and did not deal with the present claim for late payment surcharge/interest over the principal infirm power amounts. Therefore, the issue of late payment surcharge/interest as claimed in this Petition was neither directly nor substantially in issue in the former proceedings and cannot operate as *res judicata*. The law governing the principle of *res judicata* was relied upon and the judgments of *Sen PA vs. Co-op. Medical College, Kochi*, AIR 2005 Ker 245 (“...Where the issue raised in the subsequent proceedings is not the same, the principle of *res judicata* would not be attracted...”)) and *Life Insurance Company of India vs. Gangadhar Vishwanath Ranade*, AIR 1990 SC 185 (the Supreme Court granted interest on the principal amount in the third Writ Petition, rejecting the arguments that the claim is barred by the principle of *res judicata*).

Reply by the Respondents

52. PCKL raised certain objections to the Petitioner’s submissions. PCKL submitted that the questions raised by the Petitioner pertaining to its claim for LPS falls under Section 79(1)(f) of the Electricity Act, 2003 which confers adjudicatory powers on this Commission. However, the Petitioner has invoked the wrong jurisdictional clause by invoking Section 79(1)(b) of the Electricity Act, 2003. Secondly, the Petitioner’s claim for LPS is time-barred. The period of limitation for raising the said claim is 3 years. As per Ld. Senior Counsel, the Petition was filed on 4.10.2018. Any claim relating to the period prior to 5.10.2015 is time barred. The Petitioner was required to raise monthly supplementary invoices for LPS as per the strict mandate of Article 6.2 of the PPA.



However, admittedly, the Petitioner raised the supplementary invoices in regard to the claim of LPS on and from 22.1.2018. Reliance was placed by him on judgment of the Hon'ble Supreme Court in *Andhra Pradesh Coordination Committee vs. Lanco Kondapalli Power Limited* (2016) 3 SCC 468 to highlight that the provisions of the Limitation Act, 1963 are squarely applicable to the proceedings of this Commission. Further, reliance was placed on the judgements of APTEL viz. *Kalani Industries Pvt. Limited vs. RERC and Ors.* (25.10.2018) Appeal No. 185 of 2015 and *MSEDCL vs. MERC & Ors.* Appeal No. 75 of 2017 (24.4.2018) where APTEL has followed the law laid down in Lanco judgment. The Petitioner has wrongly claimed that there is any continuing cause of action. The payments regarding outstanding dues stand complete. A running account of continuing nature relates only to those cases where there is a continuing existence of some transaction. It is a settled position of law that if the wrongful act causes an injury which is complete, then there is no continuing wrong even though the damage resulting from the act may continue. In this regard, reliance was placed on the judgment of the Hon'ble Supreme Court in *Balakrishna Savalram Pujari Waghmare vs. Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798.

53. PCKL further submitted that merely because the Petitioner wrote multiple letters to PCKL that in itself does not make the claim a running account. In this regard, reliance was placed on the judgment of Hon'ble Delhi High Court in *Mahesh Chand Sharma vs. Union of India and Ors.* (4.4.2007).

54. It has been submitted by the Respondents that the Petitioner's claim for LPS/interest is barred by the principle of *res judicata* since the claim concerning interest was rejected by APTEL in its judgment dated 15.05.2015. It was further submitted that the rate at which the claim for LPS has been claimed is against the PPA approved rate. The PPA mandates SBI PLR as the applicable rate for interest.



Further, in terms of the 2014 Tariff Regulations, the SBI PLR is an improved norm agreed by the parties as the default rate for applicable interest. Accordingly, Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations cannot be the basis to determine applicable LPS. Since the Regulations itself permit a deviation from its own stipulations, therefore, the Petitioner's reliance on the PTC Judgment is erroneous. Even, assuming that LPS provisions under the CERC Tariff Regulations confer statutory right on the Petitioner to claim LPS, the Petitioner, in the PPA, waived such statutory right by agreeing that SBI PLR shall be the applicable rate for interest. Reliance in this regard was placed on the judgment of the Hon'ble Supreme Court in *All India Power Engineers Association vs. Sasan Power Ltd.* (2017) 1 SCC 487. The Respondents submitted that the Petitioner's submissions regarding unjust enrichment are not applicable to commercial contracts. The judgments of *Renu Sagar* and *Mahabir Kishore* as cited by the Petitioner relate to cases of taxation and has no applicability to the facts of the case.

55. PCKL submitted that the claim for LPS has been made in contravention of the mandate of Article 6.14 of the PPA. The said provision provides that the amounts paid from time to time are to be first adjusted towards interest on revenue arrears and then adjusted towards interest therein. However, the Petitioner computed the outstanding dues after adjusting the amount first towards LPS. Therefore, interest is being computed on an exaggerated principal amount.

56. PCKL submitted that it is not disputed that PCKL is the representative of BESCOM. The Petitioner, however, should show the delivery of the letters regarding LPS/interest since 2011.



Rejoinder/Submissions of the Petitioner

57. The Petitioner has submitted that the Respondents have wrongly contended that the Petitioner has invoked the wrong jurisdictional clause by filing the Petition under Section 79(1)(b) of the Electricity Act, 2003. This is a hyper-technical plea which is in denial of ambit of Section 79(1) of the Electricity Act, 2003. The powers of this Commission under Section 79(1)(b) are wide enough to include the Petitioner's claim for LPS over belated payments. In this regard, reliance was placed on the judgment of the Hon'ble Supreme Court in *Energy Watchdog vs. CERC & Ors.* (2017) 14 SCC 80 where the Hon'ble Supreme Court interpreted the powers of this Commission under Section 79(1)(b) of the Electricity Act, 2003 and held that the said power is not merely restricted to tariff determination, and that this Commission is conferred with wide regulatory powers. It was pointed out that Section 79(1)(f) incorporates Section 79(1)(b) by reference. The Petitioner submitted that its legitimate entitlement to LPS cannot be thwarted by adopting pleas of technical nature. It was submitted that this Commission exercises inherent powers in terms of Regulation 111 of the CERC (Conduct of Business) Regulations 1999. In exercise of such inherent powers, this Commission is not bound by any procedural technicalities so far as the issue of jurisdiction to adjudicate the claim for LPS is concerned.

58. The Petitioner, while responding to the objections that the claim of the Petitioner is barred by limitation, submitted that the Petitioner's commercial arrangement with PCKL is for a term of 25 years with a running account. Section 22 of the Limitation Act, 1963 mandates that if a breach continues then a fresh cause of action arises every time during which the breach is in operation.

59. The Petitioner submitted that PCKL admitted during the hearing that the Karnataka ESCOMs have committed a 'wrong' in belatedly clearing the dues of the



Petitioner towards invoices raised for the power supplied. However, PCKL submitted that since the said wrong no longer continues, there is no question of any continuing injury being suffered by the Petitioner. The Petitioner submitted that this is incorrect. Since 2011, the Petitioner has been apprising the KESCOMs about the amount of LPS payable by them at the end of each financial year. In each of its communication, the Petitioner has quantified the amount payable by the KESCOMs and not raised a mere request for LPS. Neither the provisions of the PPA nor the CERC Tariff Regulations stipulate any specific methodology to claim LPS. In absence thereof, the Petitioner's letters to the KESCOMs informing them of the exact amount of LPS payable are effective communications to KESCOMs regarding LPS.

60. The Petitioner submitted that although the KESCOMs have paid the outstanding dues against the power supplied, no payments have been made towards the LPS accruing over such delayed payments. Therefore, the liability to pay LPS in terms of Article 6.4 of the PPA read with relevant provisions of the CERC Tariff Regulations is operating as a continuing wrong on the part of the KESCOMs. Resultantly, the Petitioner is suffering from a continuing injury on such non-payment of LPS by the KESCOMs.

61. The Petitioner submitted that since the wrong done by the Respondents continues and LPS accrues every month, the wrong is recurring in nature. Therefore, Section 22 of the Limitation Act, 1963 is clearly applicable to the facts of this case and the Petitioner's claim for LPS is not barred by the provisions of the Limitation Act, 1963.

62. The Petitioner submitted that the PCKL's submission that the cases relied on by the Petitioner regarding Section 22 of the Limitation Act, 1963 are distinct on facts and



cannot be applied to the present case is wrong. He submitted that the principle laid down in *Bengal Waterproof Limited vs. Bombay Waterproof Limited* (1997) 1 SCC 99 is that every time a breach is committed, the plaintiff gets a fresh cause of action to come to the court by appropriate proceedings. The principle laid down in *State of M.P. & Ors. vs. Yogendra Srivastava* (2010) 12 SCC 538 is that if the denial of a benefit occurs every month, then such denial gives rise to a fresh cause of action every month based on a continuing wrong.

63. The Petitioner has submitted that in view of the above, a right/benefit to LPS arises every month based on default of a party to make payments within due date of payment. Accordingly, non-payment of the outstanding dues by the ESCOMs was continuing in nature giving rise to a fresh cause of action to the Petitioner, every time the KESCOMs defaulted to make payments. The ratio laid down in *Bengal Waterproof Limited vs. Bombay Waterproof Limited* (1997) 1 SCC 99 and *State of M.P. & Ors. vs. Yogendra Srivastava* (2010) 12 SCC 538 regarding interpretation of Section 22 of the Limitation Act, 1963 is applicable to the present dispute.

64. The Petitioner has further submitted that PCKL's contention that the rate of interest must be in terms of the PPA approved rate and not as per the provisions of the CERC Tariff Regulations is contrary to the settled law.

65. The Petitioner has submitted that the CERC Tariff Regulations have over-riding effect over the PPAs executed between the parties and he relied upon judgement of the Hon'ble Supreme Court in *PTC India Limited vs. CERC & Ors.* (2010) 4 SCC 603 wherein it was held that "A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities



to align their existing and future contracts with the said regulation.”

66. The Petitioner submitted that considering the facts and the law, the rate of interest for late payment specified in the CERC Tariff Regulations will override the rate specified in the PPA. The interest rate/LPS rate in the PPA stood revised in terms of the CERC Tariff Regulations from time to time as laid down in the judgment of the Hon'ble Supreme Court in *PTC vs. CERC* (2010) 4 SCC 603. Accordingly, the Petitioner is entitled to the applicable rate of LPS as stipulated in the said Regulations.

67. It was submitted that PCKL's submission that once the Petitioner signed the PPA agreeing to SBI PLR as the applicable rate of interest, the Petitioner waived its right to claim LPS in terms of CERC Tariff Regulations is incorrect. The Petitioner submitted that the PPA was signed on 26.12.2005 and the relevant CERC Tariff Regulations came into force on 19.01.2009 and 21.02.2014 respectively. Therefore, it is untenable to contend that the Petitioner waived its entitlement to LPS in terms of the CERC Tariff Regulations which were to be notified several years later.

68. The Petitioner also pointed out that PCKL's submission that Regulations 47 and 48 of the 2014 Tariff Regulations contemplate that parties may agree for any improved norms more stringent than the norms stipulated in the said Regulations. In this regard, the contention of the Respondents that the parties have signed the PPA and agreed that SBI PLR should be the applicable rate of interest, is misplaced. The Petitioner relied upon the provisions of the 2009 Tariff Regulation and the 2014 Tariff Regulations and submitted that only norms stipulated by these Tariff Regulations are the "norms of operation" in Chapter 8 of the 2014 Tariff Regulations and Chapter 4 of the 2009 Tariff Regulations. The present dispute relates to the Petitioner's claim regarding LPS over delayed payments. LPS is not a norm of operation for thermal



power stations. Provision regarding LPS is covered in Chapter 9 of the 2014 Tariff Regulations and Chapter 5 of the 2009 Tariff Regulations and not Chapter 8 titled 'Norms of Operation' (the 2014 Tariff Regulations) or Chapter 4 titled 'Norms of Operation' (the 2009 Tariff Regulations).

69. The Petitioner further submitted that "default" or "delay in payment" and interest payable for the same cannot be considered as a norm for operation of thermal power plants. The norm is discernible under Section 61 which warrants timely and due payment. The provision of LPS is a compensatory provision under the PPAs. KESCOMs, having violated the provisions of the PPA with respect to payment of dues, cannot seek to take advantage of the rate mentioned in PPA. Therefore, application of the quoted Regulations 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations respectively do not cease to operate in favour of the Petitioner.

70. The Petitioner has also submitted that PCKL's submission that the principles of unjust enrichment does not apply to commercial contracts goes against the plain language of Section 70 of the Indian Contract Act, 1872 which stipulates that if a person does anything for another person, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former to restore the aggrieved party to the same economic position.

71. The Petitioner's obligation to supply power to the KESCOMs was in exchange of payment against tariff invoices raised by the Petitioner. The power was supplied by the Petitioner and consumed by the consumers. Against such consumption, the KESCOMs have already charged the tariff from consumers. The KESCOMs have recovered the tariff from the consumers but delayed in making payments to the



Petitioner towards the tariff invoices within the respective due date of payments. The Petitioner is, therefore, entitled to be compensated by KESCOMs which includes both the payment of the outstanding amounts and LPS for the delayed payments.

72. The Petitioner further submitted that the averment of PCKL, during the hearing dated 20.08.2019, that *Renusagar* judgement is not applicable, is incorrect. In *Renusagar* judgement, one of the questions of law dealt was the law entitling the parties to claim interest over delayed payments in India and the Hon'ble Supreme Court specifically addressed the issue of unjust enrichment. The contract under scrutiny was a commercial contract (supply and services contract). In the said judgment, the Hon'ble Supreme Court took cognizance that the principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. Unjust enrichment was further held to provide the theoretical foundation for the law governing restitution. Therefore, for the reasons demonstrated herein-above, the law laid down in *Renusagar* judgement is squarely applicable to the present case.

73. The Petitioner pointed out that since the Petitioner's obligation to supply power to KESCOMs was in exchange of payment against tariff invoices raised by the Petitioner, therefore, the supply of power was a non-gratuitous act. The Petitioner's entitlement to payment of tariff for such power supplied and LPS on account of any delayed payments are statutorily conferred rights. The Hon'ble Supreme Court in *All India Power Engineers Federation vs. Sasan Power Ltd*, (2017) 1 SCC 487 has clarified that for any waiver of a statutory right, such waiver would have to pass muster of this Commission which would look into all factors and then pass a reasoned order. Hence, the Petitioner submitted that this Commission should not allow the KESCOMs to be unjustly enriched.



74. It was pointed out by the Petitioner that the definition of 'Principal Buyers' as provided in Article 1.1 of the PPA includes both the KESCOMs and their authorized representatives. According to PCKL's *suo-motu* disclosure in terms of Section 4(1)(b)(i) of the Right to Information Act, 2005, PCKL is the authorized representative of the KESCOMs. Therefore, any invoice sent to PCKL must be deemed to be communicated to the KESCOMs in terms of the PPA.

Analysis and Decision

75. We have heard the parties at length. The parties have argued their claims before us in terms of the provisions of the PPA, the 2009 Tariff Regulations, the 2014 Tariff Regulations, our earlier orders and judgements of higher courts. Having heard the parties and perused the documents on record, the following issues arise for our consideration:-

Issue No. (a): Whether the Petitioner is entitled to claim LPS on delayed payments of invoices of regular power supply and for supply of infirm power?

Issue No. (b): Whether the claim of the Petitioner is barred by the doctrine of *res judicata*?

Issue No. (c): Whether the claims of the Petitioner are time barred?

Issue No. (d): Whether the Petitioner has waived its right to claim LPS as per the Tariff Regulations by signing the PPA?

We have dealt with these issues one by one in the following paragraphs.

Issue (a): Whether the Petitioner is entitled to claim LPS on delayed payments of invoices of regular power supply and for supply of infirm power?

76. The Petitioner has submitted that its claim for LPS is based upon provisions of Articles 6.3 and 6.4 of the PPA dated 26.12.2005 read with Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations. The Petitioner



has submitted that on account of the failure of the KESCOMs to make payment within the stipulated time against the invoices raised, the Petitioner is entitled to LPS. The Petitioner has also submitted that PCKL is barred under Article 6.3(a) of the PPA from raising any dispute in respect of the tariff invoices at this stage of the proceedings since PCKL has not disputed the Petitioner's claim within the stipulated time.

77. The Petitioner's obligation to supply power to the KESCOMs was in exchange of payment against tariff invoices raised by the Petitioner. The power was supplied by the Petitioner and consumed by the consumers of the KESCOMs. Against such consumption, the KESCOMs have already charged the tariff from consumers. Though the KESCOMs have recovered the tariff from the consumers, they delayed in making payments to the Petitioner against the tariff invoices within the respective due dates of payments. The Petitioner is, therefore, entitled to be compensated by KESCOMs which includes both the payment of the outstanding amounts and LPS for the delayed payments.

78. The Petitioner has further submitted that it has regularly raised the bills against supply of power. Although no supplementary invoices were raised claiming LPS prior to January 2018, the Petitioner has been raising the claim of interest/ LPS since 2011 and that the Petitioner has a running account with the KESCOMs and the Petitioner has kept the KESCOMs apprised of the LPS payable by them at the end of each financial year.

79. The Petitioner has submitted that although the KESCOMs have paid the outstanding dues against the power supplied mostly after the due dates, no payments have been made towards the LPS accruing over such delayed payments. Therefore, the liability to pay LPS in terms of Article 6.4 of the PPA read with relevant provisions



of the CERC Tariff Regulations is operating as a continuing wrong on the part of the KESCOMs. Resultantly, the Petitioner is suffering from a continuing injury on account of such non-payment of LPS by the KESCOMs.

80. The Petitioner submitted that the allegations of KESCOMs with regard to delay on the part of the Petitioner to raise invoices with respect to LPS/interest until January 2018 will not discharge the KESCOMs from their obligation to make payments for the power supplied and consumed and against which tariff has been charged from the consumers. If this is allowed, PCKL shall be guilty of unjust enrichment.

81. The Petitioner has justified that the liability to pay the dues has been upheld by this Commission vide its Order dated 24.03.2017 in Petition No. 7/GT/2016. Thereafter, multiple communications were made to PCKL requesting it to issue necessary directions to the defaulting KESCOMs to pay the infirm power bills raised by the Petitioner.

82. On the other hand, the Respondents have submitted that the questions raised by the Petitioner pertaining to its claim for LPS falls under Section 79(1)(f) of the Electricity Act, 2003 which confers adjudicatory powers on this Commission. However, the Petitioner has invoked the wrong jurisdictional clause by invoking Section 79(1)(b) of the Electricity Act, 2003.

83. As regards applicability of Section 79(1)(b) of the Electricity Act, 2003, the Petitioner has submitted that the Respondents have wrongly contended that the Petitioner has invoked the wrong jurisdictional clause by filing the Petition under Section 79(1)(b) of the Electricity Act, 2003. This is a hyper-technical plea which is in denial of ambit of Section 79(1) of the Electricity Act, 2003. The powers of this Commission under Section 79(1)(b) are wide enough to include the Petitioner's claim



for LPS over belated payments. The Hon'ble Supreme Court in the matter of *Energy Watchdog vs. CERC & Ors.* (2017) 14 SCC 80, has interpreted the powers of this Commission under Section 79(1)(b) of the Electricity Act, 2003 and held that the said power is not merely restricted to tariff determination, and that this Commission is conferred with wide regulatory powers.

84. The Respondents have further contended that the Petitioner has wrongly claimed that there is any continuing cause of action. The payments regarding outstanding dues stand complete. A running account of continuing nature relates only to those cases where there is a continuing existence of some transaction. It is a settled position of law that if the wrongful act causes an injury which is complete, then there is no continuing wrong even though the damage resulting from the act may continue.

85. The Respondents have submitted that merely because the Petitioner wrote multiple letters to PCKL that in itself does not make the claim a running account. They have submitted that the claim for LPS has been made in contravention of the mandate of Article 6.14 of the PPA. The said provision provides that the amounts paid from time to time are to be first adjusted towards interest on revenue arrears and then adjusted towards interest therein. However, the Petitioner computed the outstanding dues after adjusting the amount first towards LPS. Therefore, interest is being computed on an exaggerated principal amount.

86. We have considered the submissions of the parties. There is no denying the fact that the Petitioner has performed its obligations under the PPA as regards supplying electricity to the Respondents and raised bills against supply of power as also for infirm power. Though no supplementary invoices were raised by the Petitioner



for claiming LPS prior to January 2018, the Petitioner has kept the Respondents informed about the LPS payable by them at the end of each financial year by way of communications on various dates as furnished vide affidavit dated 8.5.2019 including the quantification of amount payable by the ESCOMs. At no time of point of time until 05.06.2018 did PCKL or the KESCOMs objected to or disputed their liability to pay LPS for delayed payment of Tariff as communicated by the Petitioner.

87. We agree with the Petitioner that neither the provisions of the PPA nor the CERC Tariff Regulations stipulate any specific methodology to claim LPS. Therefore, the Petitioner is entitled to claim LPS on delay in payments of invoices of regular power supply as well as delay in payment of invoices of infirm power.

Issue No. (b): Whether the claim of the Petitioner is barred by the doctrine of res judicata?

88. The Respondents have submitted that the Petitioner's claim for LPS and interest thereon is barred by the principle of *res judicata* since the claim concerning interest was rejected by APTEL in its judgment dated 15.05.2015.

89. The Petitioner has submitted that PCKL is misleading this Commission by contending that the issue concerning interest with respect to delayed payments has attained finality in APTEL's judgment dated 15.05.2015 in Appeal Nos. 108, 119 and 122 of 2014 & No. 18 of 2013. It has submitted that APTEL's judgment dated 15.05.2015 only noted that the issue regarding interest on belated payments has been settled by this Commission in its Order dated 3.6.2014 in Review Petition No. 14/RP/2014 (in Petition No. 7/GT/2016) regarding interest on working capital and interest on loans. No finding was returned with respect to late payment surcharge on delayed payments.



90. Regarding the Order of this Commission dated 3.6.2014 in Review Petition No. 14/RP/2014, the Petitioner has submitted that PCKL has wrongly quoted paragraph 13 of the said Order disregarding the fact that the finding does not relate to 'applicable interest'. The Petitioner has submitted that the issue concerning 'applicable interest' was dealt in 'paragraph 12' of the Order dated 3.6.2014, whereas 'paragraph 13' of the same concerns with reliefs (ii) to (iv) as sought therein. Paragraph 12 of the said Order makes it clear that the Petitioner is entitled to carrying cost applicable to tariff differential between final tariff and provisional tariff. Therefore, PCKL's contention that the Petitioner's claim for interest has been expressly rejected by this Commission is mischievous and misleading.

91. The Petitioner has submitted that the Petitioner in Tariff Petition No. 160/GT/2012 specifically prayed for payment towards infirm power from the date of synchronization along with applicable interest as per the Regulation 6(5) of the 2009 Tariff Regulations. However, the Commission did not make any observation regarding the same while passing the Order dated 20.02.2014 in Petition No. 160/GT/2012. Similarly, though relief was sought with respect to 'carrying cost', this Commission did not make any observation regarding the same in its Order dated 24.03.2017 in Petition No. 7/GT/2016.

92. The Petitioner has submitted that when an issue is raised but not decided, it does not operate as *res judicata*. Therefore, the issue was neither 'specifically dealt with' nor 'decided' and thus cannot be claimed to have attained finality so as to attract Section 11 of the Code of Civil Procedure, 1908. It was mentioned that a relief stands rejected if the Order is silent on such aspect. Instead, if the substantial claim stands accepted, and there is no mention about the ancillary claim, the said relief should be



deemed to have been granted.

93. The Petitioner has pointed out that PCKL's contention of prospective application of tariff was previously raised in Petition No. 160/GT/2012 and was explicitly rejected by this Commission which has since attained finality. The Petitioner has submitted that PCKL is barred by the doctrine of *res judicata* from raising the same claim again.

94. We have considered the submissions of the Petitioner and the Respondents. PCKL has contended that the Petitioner's claim for LPS is barred by *res judicata* on the ground that interest was disallowed by this Commission's Order dated 20.02.2014 in Petition No. 160/GT/2012 and Order dated 24.03.2017 in Petition No. 7/GT/2016. However, we observe that the Petitioner in its Tariff Petition No. 160/GT/2012 filed on 01.12.2011 had prayed for payment towards infirm power from the date of synchronization along with applicable interest as per the Regulation 6(5) of the 2009 Tariff Regulations. But this Commission did not make any observation regarding the interest while passing its Order dated 20.02.2014 in that Petition. Also, the relief was sought by the Petitioner with respect to 'carrying cost' in Petition No. 7/GT/2016, but no observation was made regarding the same by the Commission in the Order dated 24.03.2017. Thus, on both occasions, the issue was raised by the Petitioner, but it was neither decided nor dealt with by this Commission in the relevant orders. We also note that APTEL has not given any finding in this regard as contended by the Respondents.

95. Additionally, PCKL in its reply has submitted that the Petitioner had claimed 'carrying cost' in Petition No. 7/GT/2016 as regards infirm power and, therefore, the Petitioner cannot claim the same again in this Petition as it is barred by the principle of



res judicata. On the other hand, the Petitioner has stated that 'interest claimed over delayed payments towards infirm power' that was claimed by the Petitioner was limited to 'carrying cost' and did not deal with the present claim for 'late payment surcharge/interest over the principal infirm power amounts'. In our view, carrying cost and LPS are two distinct claims. Therefore, we do not agree with the submissions of the Respondents and hold that the principle of res judicata would not apply in the instant case to bar the Petitioner from making a claim for LPS on delayed payment of charges.

Issue (c): Whether the claims of the Petitioner are time barred?

96. The Respondents have submitted that the Petitioner's claim for LPS is time-barred since the period of limitation for raising the said claim is 3 years. They have submitted that since the Petition was filed on 4.10.2018, any claim relating to the period prior to 5.10.2015 is time barred. The Petitioner was required to raise monthly supplementary invoices for LPS as per the strict mandate of Article 6.2 of the PPA. However, admittedly, the Petitioner raised the supplementary invoices in regard to the claim of LPS on and from 22.1.2018.

97. The Petitioner has submitted that the Petition pertains to an ongoing dispute for illegitimate withholding of dues by PCKL and that the LPS arising thereof is not barred by limitation. The Petitioner has submitted that Section 3 of the Limitation Act, 1963 which relates to 'Bar of Limitation' is subject to Section 22 of the Limitation Act, 1963 which specifically provides that:

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

98. The Petitioner has submitted that the Petitioner's commercial arrangement with PCKL is for a term of 25 years with a running account. Section 22 of the Limitation Act,



1963 mandates that if a breach continues, then a fresh cause of action arises every time during which the breach is in operation.

99. The Petitioner submitted that since the wrong done by the Respondents continues and LPS accrues every month, the wrong is recurring in nature. Therefore, Section 22 of the Limitation Act, 1963 is clearly applicable to the facts of this case and the Petitioner's claim for LPS is not barred by the provisions of the Limitation Act, 1963.

100. The Petitioner has submitted that in view of the above, a right/benefit to LPS arises every month based on default of a party to make payments within due date of payment. Accordingly, non-payment of the outstanding dues by the KESCOMs was continuing in nature giving rise to a fresh cause of action to the Petitioner, every time the KESCOMs defaulted to make payments.

101. We have considered the submissions of the parties. The counsel for the Petitioner submitted that the provisions of Limitation Act, 1963 does not apply when there is a continuing wrong. On the other hand, the senior counsel for the Respondents submitted that the proceedings in the present Petition is covered by provisions of Limitation Act, 1963.

102. Genesis of LPS lies in non-payment of regular monthly bills raised by the Petitioner. The Petitioner has claimed that the non-payment of regular monthly bills by the Respondents constitute a 'continuing breach' of the PPA and is squarely covered under exception provided in Section 22 of Limitation Act, 1963. The Petitioner has pointed out that the Petitioner's contractual arrangement with Karnataka ESCOMs is for a term of 25 years with a running account and hence Section 22 of the Limitation Act, 1963 will be applicable which provides that if a breach continues, then a fresh



cause of action arises every time during which the breach is in operation.

103. PCKL, during the hearing dated 20.8.2019, stated that admittedly this petition relates to a claim for late payment surcharge on two accounts, i.e. one relating to bills for supply of power and the other relating to bills for infirm power. PCKL submitted that there is no issue of any principal amount being outstanding in regards to these claims. To a specific query towards infirm power dues, it was clarified by UPCL that except for reconciliation of a minor amount, no dues are pending towards principal amount but amount due towards late payment surcharge are pending. We have also noted that the Petitioner has been informing the Karnataka ESCOMs about the amount of LPS payable by them at the end of each financial year since 2011. The Petitioner has placed copies of the letters written to the Respondents in this regard vide its affidavit dated 8.5.2018. The amounts towards LPS claimed by the Petitioner from time to time have been compiled as under:

S. No.	Letter No./date	Period for which LPS claims	Amount claimed (Rs.)
1.	UPCL/PCKL/2011/3282 dated 30th March, 2011	No claim. However, Respondents informed about the liability to pay late payment surcharge	
2.	UPCL/GESCOM/2012/4852 dated 3 rd April, 2012	11 th November, 2010 to 31 st March, 2012	1,16,00,566/-
3.	UPCL/HESCOM/2012/4853 dated 3 rd April, 2012	11 th November, 2010 to 31 st March, 2012	6,70,39,911/-
4.	UPCL/CESCO/2013/6786 dated 2 nd April, 2013	11 th November, 2010 to 31 st March, 2013	15,72,25,634/-
5.	UPCL/CESCO/2014/8246 dated 1 st April, 2014	11 th November, 2010 to 31 st March, 2014	34,06,66,349/-
6.	UPCL/GESCOM/2014/8244 dated 1 st April, 2014	11 th November, 2010 to 31 st March, 2014	26,95,16,432/-
7.	UPCL/HESCOM/2014/8245 dated 1 st April, 2014	11 th November, 2010 to 31 st March, 2014	56,12,89,536/-
8.	UPCL/CESCO/2015/9681 dated 1 st April, 2015	11 th November, 2010 to 31 st March, 2015	59,67,66,719/-
9.	UPCL/GESCOM/2015/9679 dated 1 st April, 2015	11 th November, 2010 to 31 st March, 2015	53,85,57,607/-
10.	UPCL/HESCOM/2015/9680 dated 1 st April, 2015	11 th November, 2010 to 31 st March, 2015	102,19,71,377/-
11.	UPCL/CESCO/2016/12352 dated 1 st April, 2016	11 th November, 2010 to 31 st March, 2016	84,02,56,949/-



12.	UPCL/GESCOM/2016/12350 dated 1 st April, 2016	11 th November, 2010 to 31 st March, 2016	86,51,57,808/-
13.	UPCL/HESCOM/2016/12351 dated 1 st April, 2016	11 th November, 2010 to 31 st March, 2016	160,85,78,027/-
14.	UPCL/GESCOM/2017/12678 dated 1 st April, 2017	11 th November, 2010 to 31 st March, 2017	122,17,71,266/-
15.	UPCL/HESCOM/2017/12679 dated 1 st April, 2017	11 th November, 2010 to 31 st March, 2017	262,20,39,545/-

The above table shows that the Petitioner on 1st April of every year has been indicating the late payment surcharge due including the arrears of the previous year(s) starting from 11.11.2010. These claims have not been denied by the Respondents. On 22.1.2018, the Petitioner raised a supplementary invoice quantifying the late payment surcharge amount as on 5.1.2018 payable by the concerned Karnataka ESCOMs. The main objection of the Respondents is that since the petitions were filed on 4.10.2018, the bills for the period three years prior to that date are barred by limitation. We are not in agreement with the contention of the Respondents. The Petitioner has been raising cumulative consolidated claims for LPS as on 1st April of every year. Even on 1.4.2016 and 1.7.2017, the Petitioner has raised consolidated bills for late payment surcharge for the period from 11.11.2010 till 31.3.2016 and from 11.11.2010 till 31.3.2017 respectively. The said claims are within the limitation period of three years reckoned from 4.10.2018 when the Petitioner approached the Commission by way of the present petition. In our view, non-payment of late payment surcharge, apart from being a continuous cause of action, is also within the period of limitation as explained above.

Issue (d): Whether the Petitioner has waived its right to claim LPS as per the Tariff Regulations by signing the PPA?

104. The Petitioner has submitted that the rate of interest must be as applicable under the relevant CERC Tariff Regulations applicable to LPS. The CERC Tariff Regulations stipulate the interest rate applicable in case of delay in the payment



beyond 60 days as 1.25% and 1.5% per month for the tariff period 2009-14 and 2014-19 respectively.

105. The Respondents have submitted that even assuming that LPS provisions under the CERC Tariff Regulations confer statutory right on the Petitioner to claim LPS, the Petitioner, by signing the PPA, has waived such statutory right by agreeing that SBI PLR shall be the applicable rate for interest. The PPA mandates SBI PLR as the applicable rate for interest. It has further submitted that in terms of the 2014 Tariff Regulations, SBI PLR is an improved norm agreed by the parties as the default rate for applicable interest. Since the Regulations itself permit a deviation, the Petitioner's reliance on the PTC Judgment that regulations will have an over-riding effect on PPA, is erroneous.

106. The Petitioner has submitted that the CERC Tariff Regulations have over-riding effect over the PPAs executed between the parties and relied upon judgement of the Hon'ble Supreme Court in *PTC India Limited vs. CERC & Ors.* (2010) 4 SCC 603 wherein it was held that *"A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation."*

107. The Respondents have submitted that the Regulations 47 and 48 of the 2014 Tariff Regulations contemplate that parties may agree for any improved norms more stringent than the norms stipulated in the said Regulations. In this regard, the Petitioner has submitted that only norms stipulated by these Tariff Regulations are the "norms of operation" in Chapter 8 of the 2014 Tariff Regulations and Chapter 4 of the 2009 Tariff Regulations. The present dispute relates to the Petitioner's claim regarding



LPS over delayed payments and LPS is not a norm of operation for thermal power stations. Provision regarding LPS is covered in Chapter 9 of the 2014 Tariff Regulations and Chapter 5 of the 2009 Tariff Regulations and not Chapter 8 titled 'Norms of Operation' (the 2014 Tariff Regulations) or Chapter 4 titled 'Norms of Operation' (the 2009 Tariff Regulations). The Petitioner has, therefore, contended that the submissions of the Respondents are untenable.

108. We have considered the submission of the parties. Regulations 37 and 38 of 2009 Tariff Regulations and Regulations 47 and 48 of the 2014 Tariff Regulations have been relied upon by the Respondents to submit that parties may agree for any improved norms that may be more stringent than the norms stipulated in the said Regulations. Consequently, such improved norms subsequently prevail and govern the rights and obligations of the parties. Respondents have argued that since the parties signed the PPA and agreed that SBI PLR should be the applicable rate of interest, therefore, such agreed rate qualifies as an improved norm in terms of Regulations 37 and 38 of 2009 Tariff Regulations and Regulations 47 and 48 of the CERC Tariff Regulations and hence the Petitioner has waived its right to claim LPS in terms of CERC Tariff Regulations.

109. The issue whether the interest rate as agreed between the parties should be considered as ceiling norms and should be adopted in place of the interest rates as per the provisions of the Tariff Regulations was considered by the Appellate Tribunal for Electricity in its judgement dated 15.5.2015 in Appeal Nos.108 of 2014 and related appeals in the context of the same generating station. The Appellate Tribunal after examining the contention of the parties has held as under:



“91. According to PCKL and Janajagrithi Samithi, the interest rate should be restricted to as approved by CERC in ‘in principle’ approval and as agreed in the PPA i.e. 7.25% as Udupi Power had voluntarily agreed to a lower interest rate.

92. On the other hand Udupi Power has contended, it had been continuously representing to the PCKL/ Government of Karnataka for amendment of interest rate in the PPA. In this connection, Udupi Power has referred to letters from State Government and minutes of meetings with State Government/ State Utilities wherein it was specifically agreed that interest rate would be as decided by CERC. It is submitted that the interest rate should be allowed on actual as per the provision of 2009 Regulations.

93. Regulation 16(5) of 2009 Regulations provides that rate of interest shall be weighted average of rate of interest calculated on the basis of actual loan prevalent at the beginning of each year applicable to the project. Therefore, we do not find any infirmity in CERC allowing interest rate as per the Regulations.

94. We do not find any merit in the contentions of Mr. Ramachandran that improved norms as agreed in the PPA shall be applied for financial norms also as per Regulation 37 of 2009 Regulations. Interest Rate is an uncontrollable factor and decided by the financial institution, Banks. PFC a Government institution is the lead lender for the project. No imprudency has been pointed out by PCKL regarding interest rates that the rates are not in line with the prevailing market interest rates. Even at the time of ‘in principle’ approval by the CERC and at the time of entering into PPA, the financial closure had not occurred. The ‘in principle’ approval by CERC was based on the estimated interest rates. CERC by order dated 09.03.2006 had clearly indicated that CERC at that stage had not gone into the process of actual determination of tariff and, therefore, it does not consider it appropriate to examine the clarification sought by Udupi Power regarding determination of tariff. CERC added at that time it was enough to say that tariff will be determined in accordance with the terms and conditions applicable at the relevant time. We also feel that Regulation 37 is relating to operation norms and not interest rates.

95. Regulation 37 of 2009 Regulations provides that norms of operation specified in the Regulations are the ceiling norms and shall not preclude the generating company and beneficiaries from agreeing to improved norms of operation and in case the improved norms of operation are agreed to, such improved norms shall be applicable for determination of tariff. Norms of operations as specified in Chapter-4 relates to normative Annual Plant Availability Factor, gross station heat rate, secondary fuel oil consumption and auxiliary consumption and do not include interest rate. Further, the issue of interest has been under correspondence between Udupi Power and State Government and utilities since the signing of the PPA. We have examined all the documents furnished by both the parties and find that even after signing of the PPA there was an understanding that interest rate will be decided by CERC.

96. CERC has correctly applied 2009 Regulations for interest rates. In view of above, the issue relating to interest rate is decided against PCKL.”

110. In the light of the above judgement, it is well settled that the ceiling norms as per Regulation 37 of 2009 Tariff Regulations or Regulation 47 of the 2014 Tariff Regulations cover only operational norms and will not cover the interest rates or for



that matter the late payment surcharge. Accordingly, we reject the contention of the Respondents that the interest rates agreed in the PPA being better than the rates specified Tariff Regulations would have to be considered for deciding the claims of the Petitioner for late payment surcharge. In our view, only the rates of late payment surcharge specified in the relevant Tariff Regulations will be applicable, and not the rates agreed in the PPA.

111. As regards the waiver, we observe that the PPA was signed on 26.12.2005 and the relevant CERC Tariff Regulations came into force on 19.01.2009 and 21.02.2014 respectively. Therefore, the Petitioner cannot be said to have waived its entitlement to LPS in terms of the CERC Tariff Regulations which were notified several years later. In fact, the Petitioner's letters to the Respondents reminding them of their obligation to pay the LPS from time to time demonstrates no intention to waive its claim for LPS.

112. BESCOM has raised the issue that it was not aware of the pending amounts pertaining to infirm power supply prior to 2018, we take note of the following submissions made by Petitioner:-

(a) Government of Karnataka accorded approval in April 2007 for setting up of a Special Purpose Vehicle *viz.* PCKL to supplement the efforts of Karnataka Power Company Limited in capacity addition. PCKL was incorporated on 20.08.2007 under the Companies Act, 1956 with an initial authorized capital of Rs. 5 (five) Crore and commenced its business operations with effect from 16.10.2007.

(b) GoK in its Order No. EN VSC 2011 dated 21.05.2011 accorded approval for entering into a Memorandum of Understanding ("*MOU*") between PCKL and the KESCOMs for the purpose of debiting the expenditure of PCKL against the seed money received from the KESCOMs. The MOU detailed the manner and proportion in which the expenditure of PCKL has to be debited to KESCOMs. Accordingly, MOUs were entered into by PCKL with KESCOMs during 2011-12.



(c) In order to bridge the short-term demand and supply gap, PCKL has been procuring power on behalf of the ESCOMs from various sources including purchase of power through Energy Exchange, Banking (SWAP) as well bilateral transactions.

113. It is clear from PCKL's submissions that PCKL, *inter-alia*: -

- (i) Represents the KESCOMs in Southern Regional Power Committee.
- (ii) Verifies and scrutinizes short-term power procurement bills and the Petitioner's energy charges bills.

114. The aforesaid functions of PCKL as well as the conduct of the KESCOMs clearly demonstrate that PCKL is their authorized representative. As such, the Petitioner considered PCKL as the primary body to communicate with respect to the business transactions concerning the Petitioner's project. If certain invoices were not sent specifically to BESCO, that cannot be used by BESCO as an excuse from not making payments towards the Petitioner's legitimate entitlements. The bills were admittedly sent to PCKL, which after due scrutiny of the invoices, sent a proforma for payment to the concerned KESCOMs.

115. We note that PCKL, in its proforma dated 02.09.2014 (certified by SLDC), admitted that total amount of Rs. 237.30 Crore (Rs. 119.71 Crores – Unit I and 117.59 Crores – Unit II) was payable towards infirm power. This included the outstanding amounts payable by BESCO. A copy of the said proforma was also sent to General Manager, BESCO with a direction to clear the outstanding dues in favour of the Petitioner. The Petitioner had sent BESCO, a copy of the letter dated 09.01.2015 addressed to the Energy Department, GoK requesting, *inter alia*, the immediate release of the pending amounts relating to infirm power supply. Therefore, BESCO's



contention that it was not aware of the pending amounts pertaining to infirm power supply prior to 2018 is erroneous and misplaced. Further, any invoice sent to PCKL is deemed to have been sent to the KESCOMs in terms of the PPA.

116. Accordingly, the Petitioner is entitled to the applicable rate of LPS as stipulated in the relevant CERC Tariff Regulations. The rate of interest for late payment specified in the Tariff Regulations will override the rate specified in PPA. We direct the Petitioner to present a consolidated bill of the outstanding late payment surcharges (late payment surcharge on the delayed payment of tariff as well as on delayed payment for supply of infirm power) to the Respondents within 15 days from the date of issue of this order. The Respondents are directed to make payment of the outstanding to the Petitioner within 60 days of issue of this order.

117. Petition No. 324/MP/2018 and Petition No. 325/MP/2018 are disposed of in terms of this common order.

sd/-
(I.S .Jha)
(Member)

sd/-
(Dr. M.K. Iyer)
(Member)

sd/-
(P. K. Pujari)
(Chairperson)

