



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 138/MP/2019

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: 28th of January, 2020

IN THE MATTER OF:

Petition filed under Section 142 of the Electricity Act. 2003 for non-compliance of the Commission's directions contained in Orders dated 09.10.2018.

AND IN THE MATTER OF:

1. ACME Kurukshetra Solar Energy Private Limited
2. ACME Rewari Solar Power Private Limited
3. ACME Mahabubnagar Solar Energy Private Limited
4. ACME Yamunanagar Solar Power Private Limited

All maintaining office at:
Plot No.152, Sector-44, Gurgaon-122002

...Petitioners

VERSUS

1. NTPC Limited
Plot No. A-8A, Block-A, Sector 24,
Noida, Uttar Pradesh – 201301,
2. Southern Power Distribution Company of Telangana Limited
6-1-50, Corporate Office, Mint Compound,
Hyderabad, Telangana, 500063.

3. Northern Power Distribution Company of Telangana Limited
2-5-3112, Corporate Office, Vidyut Bhawan,
Nakkalgutta, Hanamkonda,
Warangal-506001
4. Bangalore Electricity Supply Company Limited
BESCOM, KR Circle,
Bangalore 560001
5. Mangalore Electricity Supply Company Limited
Pardigm Plaza, A.B. Shetty Circle, Pandeshwar,
Mangalore 575 001
6. Chamundeshwari Electricity Supply Company Limited
No. 29, CSES Corporate Office, Hinkal, Vijaynagar,
2nd Stage, Mysuru- 570017
7. Gulbarga Electricity Supply Company Limited
GESCOM, Main road,
Gulbarga-585102
8. Hubli Electricity Supply Company Limited
PB Road. Navnagar, Hubballi,
Hubli, Karnataka-580025

...Respondents

Parties Present: Shri Sanjay Sen, Sr. Advocate, ACME
Ms. Anukriti Sharma, Advocate, ACME
Shri Shresht Sharma, Advocate, ACME
Shri M. G. Ramachandran, Sr. Advocate, NTPC
Ms. Poorva Saigal, Advocate, NTPC
Ms. Tanya Saigal, Advocate, NTPC
Shri Nishant Gupta, NTPC
Shri I. Uppal, NTPC

आदेश /ORDER

The Petitioners, ACME Kurukshetra Solar Energy Private Limited, ACME Rewari Solar Power Private Limited, ACME Mahabubnagar Solar Energy Private Limited and ACME Yamunanagar Solar Power Private Limited are Independent Power Producers (IPP) of clean energy and are engaged in the business of alternative energy initiatives in the solar sector. In

furtherance of respective Power Purchase Agreements (hereinafter referred to as 'PPAs') with NTPC Limited, Petitioners have set up solar power projects in different States of the country having a cumulative capacity of 150 MW AC (hereinafter referred to as 'Projects').

2. The Respondent No. 1, NTPC Limited is an Indian public sector undertaking, engaged in the business of generation of electricity and allied activities.
3. The Respondent No. 2, Southern Power Distribution Company of Telangana Limited and Respondent No. 3, Northern Power Distribution Company of Telangana Limited are distribution licensee in the State of Telangana and are beneficiaries for the power generated by the Petitioners.
4. The Respondent No. 4, Bangalore Electricity Supply Company Limited, Respondent No. 5, Mangalore Electricity Supply Company Limited, Respondent No. 6, Chamundeshwari Electricity Supply Company Limited, Respondent No. 7, Gulbarga Electricity Supply Company Limited, Respondent No. 8, Hubli Electricity Supply Company Ltd. are distribution licensees in the State of Karnataka and are beneficiaries for the power generated by the Petitioners.
5. The Petitioners have filed petition under Section 142 of the Electricity Act, 2003 for non-compliance of the Commission's directions as contained in Order dated 09.10.2018. The Petitioners have made the following prayers :

(a) Allow the instant Petition and declare that the Respondents are in violation of Order dated 09.10.2018 in Petition Nos. 230IMP120 17, 231/MP/2017, 232/MP/2017, 233/MP/2017.

(b) Direct the Respondents to implement and fully comply with the Order dated 09.10.2018 issued by the Commission.

(c) Direct the Respondents to pay Late Payment Surcharge as per PPAs from 15.01.2019 i.e. expiry of 60 days from the date of submission of claim, applicable as per CERC Order dated 09.10.2018.

(d) Issue such other/further order(s) as the Commission may consider appropriate in the facts and circumstances of the present case.

Background

6. On 10.03.2015, MNRE issued guidelines for implementation of selection of 3000 MW Grid-connected Solar PV Power Projects under “State Specific Bundling Scheme”.
7. The Petitioners were selected by NTPC for development of solar projects, generation and sale of solar power.
8. On 24.06.2016, ACME Kurukshetra and ACME Rewari entered into respective PPA with NTPC for supply in the State of Karnataka.
9. On 08.08.2016 & 09.08.2016, ACME Mahbubnagar and ACME Yamunanagar entered into respective PPA with NTPC for supply in the State of Telangana.
10. On 01.07.2017, The Central Goods and Service Tax Act, 2017 along with the Integrated Goods and Service Tax Act, 2017 and State(s) Goods and Service Tax Act, 2017 (hereinafter referred to as ‘GST Law’) were enacted.
11. The Petitioners issued Change in Law event notices to the Respondents. However, no response was received. The Petitioners filed the petitions before the Commission seeking approval of ‘Change in Law’ and consequential relief to compensate for the increase in capital cost due to introduction of GST Laws.
12. On 09.10.2018, the Commission held that the enactment of ‘GST laws’ is covered as ‘Change in Law’ under Article 12 of the PPA. As regards the claim (subject to threshold limit) during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. In respect of PV Modules post enactment of ‘GST

Laws' 5% will be applicable on intra State procurement as well as import by EPC or SPV. The amount as determined by Petitioners shall be on 'back to back' basis to be paid by DISCOMS to Petitioners under the respective 'Power Sales Agreements'. The Claim shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPAs. The claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the 'late payment surcharge' as provided under PPAs is to be levied. The claim of the Petitioners on account of additional tax burden on 'O&M' expenses (if any), is not maintainable.

13. On 16.11.2018, the Petitioners in terms of the Order dated 09.10.2018 issued Supplementary Invoices being:
 - a. ACME Mahbubnagar Solar Energy Private Limited: Rs. 6,00,00,000/-
 - b. ACME Rewari Solar Power Private Limited: Rs. 11,40,00,000/-
 - c. ACME Yamunanagar Solar Power Private Limited: Rs. 3,92,00,000/-
 - d. ACME Kurukshetra Solar Energy Private Limited: Rs. 11,28,00,000/-
14. On 22.11.2018, NTPC had forwarded the claims to Karnataka and Telangana Discoms.
15. On 17.12.2018, Telangana Discoms raised certain queries as regards the veracity of the claim raised by the SPD and had sought for certain additional data.
16. On 27.12.2018, NTPC communicated to the Petitioners the various queries and defects observed by the Telangana Discoms in the claims raised by the Petitioners.
17. On 28.12.2018, NTPC wrote to the Telangana Discoms informing them that they have communicated to M/s. ACME Mahbubnagar Solar Energy Private Limited and M/s. ACME Yamunanagar Solar Power Private Limited about the provisional defects and has sought comments from the SPD on the same.
18. On 14.01.2019, BESCOM raised certain queries as regards the veracity of the claim raised by the Petitioners and had sought for certain additional data, including proof of payment such as

GST receipts, FORM GSTR- I etc. Further, BESCOM also raised the issue of payment of GST @ 18% and claims beyond the SCoD.

19. On 16.01.2019, the Petitioners issued a detailed response to NTPC responding to the defects raised in its email dated 27.12.2018.
20. On 18.01.2019, ACME Solar Holding Ltd. issued letter to NTPC regarding pending payments pointing out that the payments of Rs. 22,68,00,000/- were to be made by 17.01.2019. ACME Solar Holding Ltd. also issued another letter to NTPC regarding pending payments qua GST Claims on account of Change in Law for 5 x 10 MW solar power projects in Telangana pointing out that the payments of Rs. 9,92,00,000/- were to be made by 17.01.2019.
21. On 04.02.2019, NPTC issued an email to ACME Kurukshetra Solar Energy Private Limited seeking revised Chartered Accountant certificate on account of typographical errors.
22. On 05.02.2019, ACME Kurukshetra Solar Energy Private Limited issued revised Chartered Accountant certificate with copy of Invoices.
23. On 15.02.2019, the Petitioners issued respective communications seeking status of payments due.
24. On 28.02.2019, NTPC, raised the bill on the Karnataka Discoms including the payment of the amount in terms of the Order dated 9.10.2018.
25. On 01.03.2019, BESCOM sought clarification in respect of the amount claimed by the Petitioners. NTPC forwarded the said Letter to the Petitioner for clarification.
26. On 03.04.2019, the Petitioner gave a point wise clarification in respect of the queries raised by BESCOM.

27. On 04.04.2019, the Petitioners issued an email to NTPC requesting confirmation towards verification of claims and invoices submitted to DISCOMs in Karnataka and Telangana.
28. On 04.04.2019, NTPC responded to the Petitioners email of 04.04.2019 confirming that it has already billed the concerned DISCOMs of Karnataka and Telangana after due verification at its end. No communication has been received thereafter from NTPC, Telangana and Karnataka DISCOMs.
29. On 9.04.2019, NTPC also sent clarification to BESCOM.
30. On 10.04.2019, the Petitioner raised a Supplementary Invoice.
31. On 10.05.2019 and 27.05.2019, NTPC sent reminders to the Karnataka/Telangana Discoms to pay the amount as per the bill raised on 28.02.2019.
32. On 17.10.2019, NTPC wrote to the Telangana Discoms for release of payment.
33. Hence, the present Petition.

Submissions of the Petitioners

34. The Petitioners have submitted that with the enactment of 'GST Laws' on 01.07.2017, new tax slabs of 5% to 28% were introduced on goods required for execution, construction and operation of Solar Projects which were previously exempted or were under lower tax slabs. Also, vide Notification No. 50/2017-Customs dated 30.06.2017, issued by Custom Department, Central Government has waived certain exemptions that were earlier granted to the Petitioners which were considered at the time of the bidding. Implementation of GST Laws had increased the capital cost of the project.
35. The Petitioners have submitted that on account of the above notifications, they had given notice to the Respondents mentioning about the occurrence of "Change in Law" event as per

Article 12 of the PPA due to implementation of GST Laws. Since, the Respondents did not reply to the above notices, they had filed Petitions before the Commission for approval of 'Change in Law' and consequential reliefs. The Commission, duly considering the submissions of the Petitioners and rival contentions of Respondents, issued its Order dated 09.10.2018. The Commission by way of the Order of 09.10.2018 held inter alia:

- (a) Declared introduction of GST Law as a 'Change in Law' event under the PPAs.
- (b) Directed the Petitioners to exhibit clear and one to one correlation between the Projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by an auditor certificate.
- (c) Directed the Respondent to reconcile the claim amount to be paid to Petitioners with effect from 01.07.2017 and pay the same within 60 days from the date of issue of the CIL Orders.
- (d) Directed that in case the Respondents fail to do make the aforesaid payments within 60 days from Order, they would attract late payment surcharge in terms of the PPAs.

36. The Petitioners have submitted that the present Petition is filed under Section 142 of Electricity Act, 2003 (hereinafter referred to as 'Act') against the willful and deliberate defiance by the Respondents of Order dated 09.10.2018. The Respondents have not complied with the directions issued by the Commission in the Order and resultantly have not made the lawful and due payments to the Petitioners in terms of the said Order. There is an outstanding of Rs. 32.60 Crores along with a late payment surcharge of Rs. 4.08 Crores as on 25.10.2019.

37. The Petitioners have submitted that provision of Section 142 of the Act can be invoked where there is a non-compliance of any direction issued by the Commission. The Petitioner has placed its reliance on Interim Order dated 06.03.2019 passed in the matter of *GMR Warora Energy Limited vs. Tamil Nadu Generation and Distribution Corporation Limited being Petition No. 286/MP/2018*, wherein the Commission exercising its powers under Section 142 of the Act has directed the respondents therein to deposit 50 % of the said amounts payable. The Petitioner has also placed reliance on Order dated 09.10.2015 in Petition no. 124/RC/2015 titled *Bharat Aluminum Company Ltd. vs. Chattisgarh State Power*

Transmission Company Ltd. wherein the Commission has inter alia held that a petition filed under Section 142 of the Act seeking compliance of its Order including seeking payments is maintainable. This Commission by virtue of its Order dated 09.10.2015 has further held that in the absence of any stay of the operation of its Order, the Respondents cannot be permitted to avoid implementation of the directions of the Commission.

38. The Petitioners have submitted that the Telangana Discoms are seeking benefit of its own wrong by not making the due payments, in complete disregard and non-compliance to the directions passed by the Commission in its Order dated 09.10.2018, which in itself calls for an action under Section 142 of the Act.
39. The Petitioners have submitted that despite being well aware of the fact that the payments due are sought to be paid within the terms of the Order dated 09.10.2018 and the same being genuine and verified by NTPC vide its email dated 04.04.2019, Telangana Discoms have not only knowingly and deliberately chosen to not comply with the said Order but have proposed to the Commission not to interfere in a situation where its Orders are being flouted by will.
40. The Petitioners have submitted that the mechanism provisioned for payment of Tariff / Monthly Invoice / Supplementary Invoice under the PPA/PSA are not on back to back basis as is being erroneously claimed by NTPC. The scheme of the PPA is abundantly clear and makes no provision whatsoever establishing a method where the payments towards Tariff / Monthly Invoice / Supplementary Invoice as raised by the Petitioner can only be made once the corresponding payments are received by NTPC from Respondent No. 2 to 8.
41. The Petitioners have submitted that Article 10.2.1 very clearly provides for the content of Monthly Bill/Supplementary Bill to be issued to NTPC, followed by Article 10.3.1 whereby the PPAs casts upon NTPC the responsibility of payment of bills by the due date. Only Article 10.3.3 of the PPAs provides for payment of late payment surcharge to be made to the Petitioners after the same having been received by NTPC. Hence, the only case where the payment is to be made after the same having been received by NTPC is under Article 10.3.3 of the PPAs. The Petitioner has placed its reliance on the decision of the Hon'ble Supreme

Court in the matter of *B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd.* (2015) 12 SCC 225 (Para 10 & 11) wherein the maxim “*expressio unius est exclusio alterius*” has been held to be applicable on contractual matters as well. The said maxim means that expression of one is the exclusion of another. The Hon’ble Court while dealing with the issue of which court shall have the competent jurisdiction to adjudicate an inter-se dispute between the parties, held that where the contract specifies the jurisdiction of the court at a particular place and such courts have jurisdiction to deal with the matter, an inference may be drawn that parties intended to exclude all other courts.

42. The Petitioners have submitted that payment obligation of NTPC is not on back-to-back basis under the PPAs qua monthly and supplementary invoices, but only for the payment of Late Payment Surcharge, for it is specifically provided to be so in the PPAs. It is imperative to point out that NTPC has been making regular payments towards tariff without any reliance on the alleged back-to-back arrangement. Article 10.7 of the PPAs specifies that Petitioners may raise a “Supplementary Bill” for payment on account of “Change in Law” and the same shall be payable by NTPC in a timely manner by the due date. The payments towards “Change in Law” are to be made through Supplementary Bill and at no point the payment of the Supplementary Bill on account of Change in Law is to be made after the amounts are received by NTPC from Respondent No. 2 to 8. If NTPC is to only pay the Petitioner after having received the said amounts from Discoms, then the entire purpose of NTPC’s participation in the current scenario wherein it was involved to provide much needed bankability to the project of the Petitioner / SPDs along with the acclaimed comfort is exhausted for being futile. The terms of the PPAs make it abundantly clear that the payments are to be made by NTPC without any demur and at no point being subject to the said payments having been received from Discoms, for these are to be paid on monthly basis and cannot be paid in lumpsum or quarterly basis. NTPC has a separate and independent mechanism with the Discoms in order to secure its payments and the same at no provision is pre-condition that the payment of the Petitioner cannot be made till the time the said payments towards Tariff / Monthly Bill / Supplementary Bill are not received by NTPC.
43. The Petitioners have submitted that Article 10 of the PPAs makes it abundantly clear that the

Tariff / Monthly Bill / Supplementary Bill will be raised by the SPD / Petitioner on NTPC and the same shall be payable by NTPC, while the PPAs under Article 10.4 clearly provisions for a Payment Security Mechanism (LC) which as a matter of fact has not been provided to the Petitioner till date.

44. The Petitioner has submitted that as far as the role of NTPC being an intermediary nodal agency is concerned:

(a) NPTC was made nodal agency for setting up 15000 MW Grid Connected Solar PV Power Plants under the National Solar Mission in a span of 5 years from 2014-15 to 2018-19” by MNRE. NTPC was then granted the inter-State Trading Licence for electricity vide Order dated 14.10.2016 passed by the Commission. Hence, NTPC is an electricity trader for the purposes of the Act and the present transaction i.e. PPA/PSA.

(b) NTPC was to provide much required comfort (including NTPC’s credit worthiness and capital adequacy) to the Solar Power Developers including its bankability (which, for a generation project depends upon its timely and complete payments of invoices). MNRE notified guidelines in March 2015 – ‘State Specific Bundling Scheme’ through Clause 4.6 which unequivocally provides for Payment Security Fund/Working Capital fund that will be set up with a corpus of approximately Rs. 2,300 Crores in order ensure timely payment to the developers.

(c) NTPC is not merely a ‘conduit’ or a fence sitter but has the bounden duty to perform its obligations including that of making timely and complete payments to the Petitioner (as in the present case).

45. The Petitioners have submitted that the entire setup of contractual arrangement and payment obligations are to be seen and understood in the electricity regulatory context, whereby power purchase and supply is regulated. It is to be understood that “trading” is a licensed activity and NTPC is a “trader” buying electricity from the generators for the purposes of resale and earning trading margin for the same. The Black’s Law Dictionary defines “trader” as one who buys goods to sell them at a profit. Therefore, the two acts of purchase and sale of electricity are independent of each other whereby the intermediary i.e. NTPC is also earning margin

from the sale of electricity. The reliance of NTPC on the Presidential Scheme is unsustainable and the same does not change the meaning / obligation of 'trader'.

Submissions of the Respondent No. 1 (NTPC)

46. The Respondent No.1 submitted that the Petition filed by the Petitioners purporting to be under Section 142 of the Electricity Act, 2003 is misconceived and is liable to be dismissed in limine because of following reasons:
- a. Section 142 of the Electricity Act is a penal provision and is applicable only as a punishment for non-compliance of a direction of the Appropriate Commission.
 - b. Such provision imposing a penalty is for a deliberate act on the part of a person/entity in not complying with the directions of the Commission.
 - c. The proceedings under Section 142 of the Act cannot be invoked for execution of an Order passed by the Commission, much less for recovery of money under any Order.
 - d. The PPAs itself provides for the consequences of non-payment of money by the prescribed time, namely, the payment of Late Payment Surcharge, third Party Sales etc.
 - e. The Order dated 09.10.2018 passed by the Commission provides for the payment of Late Payment Surcharge in case of delay beyond 60 days.
 - f. The petition under Section 142 of the Act cannot be invoked particularly where there are serious issues involved on the enforcement of the claim by the SPDs against NTPC.
 - g. The prayers made in the petition is for recovery of money and enforcement of the claim against NTPC before NTPC recovers the amount under the corresponding Power Sale Agreement (hereinafter referred to as the 'PSA') from the distribution companies, namely, Respondents 2 to 8 herein.
 - h. The provisions of the nature of Section 142 of the Act are not for proceeding for enforcing of the Order or enforcing the recovery of money. The Respondent No. 1 has placed reliance on the following decisions of the Hon'ble Courts and the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL'): *The Hon'ble Supreme*

Court in R.N. Dey and Ors. –v- Bhagyabati Pramanik and Ors. (2000) 4 SCC 400; Decision dated 13.09.2007 passed by APTEL in Appeal No. 115 of 2007- B. M. Verma –v- Uttarakhand Electricity Regulatory Commission; Decision dated 15.05.2017 passed by the APTEL in Appeal No. 103 of 2017 and Batch- BSES Rajdhani Power Limited –v- The Secretary, Delhi Electricity Regulatory Commission; Karnataka Rare Earth and Another vs. Senior Geologist, Department of Mines & Geology and another 2004 (2) SC 783.

47. The Respondent No.1 has further submitted that the PPAs entered into by NTPC with the Petitioners are for purchase of solar power, entirely for resale to the distribution companies, namely, Respondents 2 to 8 under the respective PSAs. NTPC is acting as an intermediary, utilizing the Inter State Trading Licence granted to its wholly owned subsidiary company - NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as 'NVVN') to facilitate such purchase and resale of electricity. NTPC is not acting as a merchant trader or otherwise independently purchasing the electricity from the Petitioners having the option to sell electricity to any person at such time and on such terms and conditions as NTPC can decide from time to time. NTPC is also not retaining the powers to trade electricity so purchased in the open market or through the platform of Power Exchange or through another trader on a long term basis to earn a trading margin, without being constrained to the fixed trading margin of 7 Paise/Unit decided by the MNRE.
48. The Respondent No.1 has submitted that the role of NTPC/NVVN to trade in electricity has been authorized by the Commission in its Order dated 14.10.2016 in Petition No. 2/TDL/2016, which inter alia provides as under:

“9.....As already held NVVN is a wholly owned subsidiary of NTPC which exercises persuasive control over the management and operation of NVVN. Moreover, NTPC in fulfillment of its obligations under the National Solar Mission is required to purchase power from the Solar Power Developers and sell it to the distribution companies after bundling the same with thermal power. Since, the process involves purchase and sale of solar power which has been recognized as trading activity under the Act, NTPC requires a licence to undertake such activity. Since NVVN which is wholly owned subsidiary of NTPC has been issued a Category I inter-State trading licence, we are of the view that NTPC can utilize trading licence issued to NVVN in order to fulfill its

obligations under the National Solar Mission. Therefore, the Commission permits NTPC to utilize the licence issued to NVVN, its wholly owned subsidiary, to purchase solar power from Solar Power Developers and sell it to the distribution companies. The billing for purchase and sale of solar power shall be made in the name of NVVN but settlement of the tariff and other dues shall be made by NTPC in terms of the provisions of the PPA or PSA as the case may be. This will obviate the need for any change in the PPA or PSA that NTPC has entered with the Solar Power Developers or the distribution companies respectively. NTPC shall work out the procedure for effecting this arrangement. It is clarified that this special dispensation has been given by the Commission keeping in the furtherance of the objective of procurement and sale of solar power in a viable manner under National Solar Mission being Ministry of MNRE and Government of India Programme to provide comfort to the development for the bankability of the Solar Project and shall not be quoted as precedent.

49. The Respondent No.1 has submitted that being a “State Specific Bundling Scheme”, from the very beginning, the ultimate beneficiaries had been identified, namely the Distribution Licensees of the State in which the Solar Power project is being set up. Thus, the Petitioners were aware from the beginning that ultimate beneficiaries of the power generated at their Project shall be the respective Distribution Licensees of the State in which the project is being set up. NTPC/NVVN had initiated a Competitive Bid Process for selection of the Petitioner to establish the solar power project, generate and supply solar power to NTPC/NVVN to enable NTPC to bundle the solar power with the conventional power generated by NTPC and supply the same to Respondents 2 to 8. The Request for Selection (hereinafter referred to as ‘RfS’) was issued in terms of the provisions of the Guidelines and a copy of the PPAs was attached to the RfS as a bidding document made available to the participating bidders. A Draft PPA was also made available as part of the bidding document. In pursuance to the above, upon the selection of the SPD/Petitioners, the PPAs were entered into between the Petitioners and NTPC. The provisions of the PPAs specifically deal with the back-to-back PSA between NTPC and the Distribution Companies. The PSA in respect of ACME Kurukshetra was executed by NTPC with the Karnataka Discoms on 17.05.2016 with an initialed copy of the PPAs to be entered into by NTPC with the SPD, as an annexure to the PSA. The PPA in respect of ACME Kurukshetra was entered into on 24.06.2016 i.e. after due execution of the PSA on 17.05.2016. Accordingly, the PPAs with the Petitioner was executed on a back-to-back basis after the PSA had been executed with the Karnataka Discoms.

50. The Respondent No.1 has submitted that it is evident from the provisions of the PPAs and the PSA that both the documents are inextricably intertwined with one another. From the very beginning, the PSA identified the source of the power, namely from the ACME Solar Holdings Project being set up in Karnataka or Telangana as the case may be. Further, by virtue of the RfS and bidding being conducted under the State Specific Bundling Scheme, the Petitioner was aware that the ultimate beneficiary of the power generated was the Distribution Licensee of Karnataka or Telangana as the case may be. The Recitals and the aforementioned Clauses of the PPAs and PSA are sufficient indication of the back-to-back arrangement under the entire scheme.
51. The Respondent No.1 has submitted that the PPAs entered into with the SPDs duly recognize that the payment becoming due under the PPAs is to be serviced by NTPC with Late Payment Surcharge as dealt in Article 10.3.3 for the delay in the recovery of the amount by NTPC from the Respondent Discoms. The Guidelines issued by the Central Government also recognize the payment to be made by NTPC to the SPDs in case of default by the distribution licensees and has restricted it to the specific funds (Working Capital Fund) available to NTPC in terms of Clause 4.6 of the Guidelines. The provisions have been made recognizing that NTPC, as an intermediary nodal agency cannot be required to pay the amounts becoming due to Petitioner out of its own resources, till such time the amount can be recovered by NTPC from the distribution licensees i.e. Respondents 2 to 8.
52. The Respondent No.1 has submitted that Article 14.5 of the PPAs has provided a superseding non-obstante clause stipulating that the Petitioner agree that NTPC is an intermediary nodal agency to facilitate sale of solar power by providing significant competitive pricing by providing 2:1 cheaper conventional power, and NTPC can assume payment and other financial obligations and related obligations including on opening the Letter of Credit to the SPDs, in the background set out in the said Article 14.5. Further, Order dated 09.10.2018 clearly recognizes back-to-back arrangement of the PPAs and PSAs. The Commission had considered the intermediary role of NTPC/SECI as a nodal agency to facilitate the purchase and sale of electricity from the solar power projects to the Discoms and had concluded that the amount determined as payable shall be on a back to back basis and paid by the Discoms

to the intermediary nodal agency under the respective PSAs, to be remitted to the Petitioners SPD under the PPAs.

53. The Respondent No.1 has submitted that the role of an intermediary Trader vis-à-vis a Merchant Trader has also been considered by the APTEL in its Judgment dated 4.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors.* In the present case, the tariff payable by the Discoms under the PSA and as approved by the State Commission is the tariff under the PPAs. There is no separate purchase price under the PPAs and the PSA except that the PSA envisages payment of trading margin to NTPC. In all other respects, the terms and conditions of the PPAs are exactly the same as the terms and conditions of the PSA. The PPAs and PSA being back to back contracts and mirror images to each other are inextricably linked to each other. The role of an Intermediary Trader as a 'conduit' has also been considered by this Commission in the following cases: *Order dated 18.04.2016 passed by the Commission in Petition No. 319/MP/2013 in the case of Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors;* *Order dated 30.04.2019 passed by the Commission in Petition No. 255/MP/2017 in the case of Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors;* and *Order dated 18.01.2019 passed by the Commission in Petition No. 224/MP/2018 in the case of M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*
54. The Respondent No.1 has submitted that in terms of the above decisions, the Commission has already rejected the claim of absence of privity of contract between the Generator and the Distribution Licensee when the Generator sells electricity to an intermediary trading company and the Trading Company re-sells the electricity on a back-to-back basis to the Distribution Licensee. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement. It is on the above basis only that the Commission has decided on the jurisdiction to entertain the Petition filed by a generating company involving the Distribution Licensee on a sale of power through a trading company to grant the necessary relief for matters such as Penalties for shortfall in

availability of contracted capacity, effect of change in law etc. The present case of the PPA and PSA being on a back-to-back basis is consistent with the above. The Commission is impleading the distribution licensee on a Petition filed by the Petitioners so as to enforce the directions arising out of the admitted claims of the Petitioners against the Discoms even though the PPAs are entered into between the Petitioners and NTPC.

Submissions of the Respondent No. 2 & 3

55. The Respondent No. 2 and 3 has submitted that:

- a. section 142 of the Act is a penal provision and is applicable only in event of non-compliance of the provisions of Act, rules and a direction of the Appropriate Commission. Such a penal provision imposing penalty for a deliberate act on the part of a person/entity cannot be used to execute orders of the Commission. The proceedings under Section 142 of the Act cannot be invoked for execution of an Order passed by this Commission, much less for recovery of money under any order. The petition filed is therefore, misplaced and needs to be rejected.
- b. the CERC order dated 09.10.2018 provides for payment of late payment surcharge in case of delay beyond 60 days.
- c. aggrieved by the CERC Orders, NTPC has filed Appeal before APTEL u/s 111 of the Electricity Act, 2003 and is pending for adjudication.
- d. the Respondents are also in the process of filing an appeal before APTEL.

56. The Respondent No. 2 and 3 have submitted that without prejudice to the aforesaid, the claims of Petitioner were scrutinized by the Respondents and the following defects have been noticed:

- (a) The Petitioners stated that they have engaged M/s ACME Cleantech Solution Private Limited as their EPC contractor and have executed the contract dated 20.01.2017. However, it is noted from the claim invoices that GPST numbers of M/s ACME Cleantech Solutions Private Limited and Petitioners were identical.

- (b) The CERC order categorically directs the Petitioners to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor's certificate. As such, the SPD may be requested to establish clear correlation between M/s ACME Clear-tech Solutions Private Limited and the Petitioners.
- (c) The CERC Order directed NTPC/DISCOMS to reconcile the claims made by the Petitioners w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology discussed in para 338 & 348 of the Order. Para 348 of the CERC order allowed for GST @ 5% on various categories such as PV Modules, mounting structures, Power Conditioning Unit etc. However, it is observed that the Petitioners have raised GST @18% on certain categories. The same may have to be verified.
- (d) Certain claims are raised on the invoices which are beyond SCoD viz. 18.08.2017 and as such those claims need not be considered as per the understanding of the Telangana Discoms.
- (e) The invoices have to be accompanied with GST receipt by the concerned Government to cross check that the GST payment was made.
- (f) Apart from these preliminary defects mentioned above, it is found from the documents that even Insurance Coverage for the total completed project commenced only from 11.08.2017.
- (g) The invoices shall be cross verified with the contractual agreements in respect of price based on which GST amounts are arrived.
- (h) The execution of the Petitioners projects have been overseen by NTPC/NVVNL as per the provisions of PPA. Hence, NTPC may first verify all the claim documents and furnish the break up of claims that are allowed with detailed reasons for admitting the same duly furnishing the documentary proof.

57. The Respondent No. 2 and 3 have submitted that these preliminary observations along with the provisional defects noticed on the claims of M/s ACME Mahabubnagar Solar Energy Private Limited & M/s ACME Yamunanagar Solar Power Private Limited were communicated to NTPC vide letter dated 17.12.2018. The Petitioners have responded to the letter dated 17.12.2018 of the Respondents vide letter dated 18.01.2019 addressed to NTPC

wherein they have given their explanation on various defects or issues raised by the Respondents but until NTPC first verifies all the claim documents and furnish the breakup of claims that are allowed with detailed reasons for admitting the same duly furnishing the documentary proof, the Respondents cannot make any payment.

58. The Respondent No. 2 and 3 have submitted that admittedly the Petitioners did not submit all the relevant documents until the same were pointed out by the Respondents vide their letter dated 17.12.2018. Only thereafter did the Appellants submitted some of the relevant documents on 18.01.2019, which itself is beyond the period of 60 days from the Order dated 09.10.2018. Therefore, the Petitioners cannot say that the Respondents have not complied with the directions issued by this Commission by way of Order dated 09.10.2018 in Petition Nos. 232/MP/2017, 233/MP/2017 & other batch petitions. Further, the outcome of appeal filed by NTPC before the APTEL and the proposed appeal by the Telangana Discoms would have a bearing on the CERC Order. As such, seeking the implementation of the CERC Order by the Petitioners, when the impugned order is challenged before APTEL is not justified.
59. The Respondent No. 2 and 3 have submitted that in the above circumstances, the present petition is entirely misconceived and is a gross and complete abuse of the process of law and therefore liable to be dismissed with cost.

Submissions by the Petitioners vide Rejoinder in Reply to Respondent No. 1

60. The Petitioners have reiterated the facts submitted in the petition, as such the same are not reproduced herewith for the sake of brevity. Additionally, the Petitioners have submitted as under:

Re: Maintainability of the present Petition u/s 142 of the Act:

61. The Petitioners have submitted that they are neither seeking adjudication of dispute, nor any determination of lis but, is rather seeking compliance of Order dated 09.10.2018 of the Commission whereby the lis has already been decided and determined by this Commission

and the Respondents have admittedly failed to comply with the same. Submissions of NTPC is a smokescreen to avoid its liability to pay the Petitioners its lawful dues in terms of the Order dated 09.10.2018. NTPC in the reply has itself admitted that the amounts payable under the said GST claims of the Petitioner are payable and will be paid along with the Late Payment Surcharge. NTPC by virtue of the present reply is misguiding the Commission and on this ground alone, the reply of NTPC is liable to be rejected. Further, NTPC has taken another contrary position in the concluding paragraph of the reply where it has submitted that the present Petition under Section 142 is not-maintainable qua NTPC whereas the same Petition is maintainable vis a vis appropriate directions to the Respondent No. 2 to 8.

62. The Petitioners have submitted that it is evident that the language in Section 142 of the Act does not use the word “deliberate” or “mensrea to commit such contravention” as being submitted by the Respondent. The Petitioners have placed their reliance on the judgment of Hon’ble Supreme Court in *Chairman SEBI Vs. Shriram Mutual Funds (2006) 5 SCC 361*.
63. The Petitioners have submitted that they have filed the present Petition seeking compliance simpliciter of the Order dated 09.10.2018 passed by the Commission and in-effect has requested the Commission to show cause the Respondents as to why the directions of the Commission have been contravened. A perusal of the prayer clause of the petition will further reflect that no specific prayer for imposition of any penalty / punishment has been prayed for as it is the sole prerogative of the Commission to assess and pass suitable orders. Further, the judgments cited by the Respondent No. 1 in its reply are not applicable to the facts of the present proceedings.

Re: Role of NTPC vis a vis the Solar Power Developers

64. The Petitioners have submitted that it is another untenable contention of the NTPC that under the contractual construct of the PPA / PSA, it is merely a ‘conduit’ trader, an intermediary nodal agency to facilitate sale of solar power by providing significant competitive pricing, by providing 2:1 cheaper conventional power and cannot be required to pay the amounts becoming due to the SPDs out of its own resources, till such time the amount is recovered by

it from the respective Discoms.

65. The Petitioners have submitted that NTPC is an electricity trader for the purposes of the Act and in the present transaction i.e. PPA/PSA, NTPC cannot act as a mere 'conduit' or 'intermediary agency'. The idea to introduce an electricity trader in generation, is that it serves the purpose of providing a hedge to independent power producers, by agreeing to purchase a certain amount of energy or capacity, thus enabling investors to build capacity, where they might otherwise have deferred. Moreover, traders are introduced so they can assume an agreed level of risk that might help investors attain the requisite revenue stream to enable a plant to be built that otherwise might not have been completed. This is the underlying objective for the policy decision to involve NTPC as a trader. Hence, now NTPC cannot shirk from its responsibility of making timely payments to the Petitioner as entrusted upon it especially when the bankability of the project of the Petitioner is being affected due to lack of much needed funds.
66. The Petitioners have submitted that Clause 4.6 of the guidelines provides as under:

4.6 Payment Security Fund

A payment Security Fund/ Working Capital Fund will be set up with a corpus of approximately Rs. 2,300 Crores in order to ensure timely payment to the developers. Accruals from encashment of Bank Guarantees, Penalties/ Liquidated Damages on developers, etc. will also accrue to the fund. The difference between sale price of bundled power and fixed Rs. 3/KWH paid for excess generation will also go into Payment Security Fund. Performance Guarantee Deposit may also be used in Payment Security Fund. Litigation charges, costs and claims, if any, may be paid from the Payment Security Fund.

67. The Petitioners have submitted that the same provides for Payment Security Fund/Working Capital fund that will be set up with a corpus of approximately Rs. 2,300 crores in order ensure timely payment to the developers. It is therefore unequivocally clear from the above that the role of NTPC is not merely of a 'conduit' or a fence sitter but has the bounden duty to perform its obligations including that of making timely and complete payments to the Petitioners. NTPC has referred to the above mentioned Guidelines but has concluded in that

regard that Petitioners were aware from the beginning that ultimate beneficiaries of the power generated at their project shall be the respective Discoms of the State where the project is being set up. NTPC has taken conflicting stand qua its role and obligations. NTPC in terms of the Guidelines has been equipped by virtue of Payment Security Fund/Working Capital Fund to make payments to the Petitioner. It is not understood as to how NTPC is claiming to be a 'conduit' or a mere facilitator.

Re: Obligation of NTPC under the PPA / PSA to make payments not subject to receiving prior payments from Discoms

68. The Petitioners have submitted that the mechanism as provided in the PPA/PSA for payment of Tariff / Monthly Invoice / Supplementary Invoice are not on back to back basis as being claimed by NTPC. The scheme of the PPA is abundantly clear and makes no provision whatsoever establishing a method where the payments towards Tariff / Monthly Invoice / Supplementary Invoice as raised by the Petitioner can only be made once the corresponding payments are received by NTPC from Respondent No. 2 to 8. Article 10 of the PPA makes it abundantly clear that the Tariff / Monthly Bill / Supplementary Bill will be raised by the Petitioners upon NTPC and the same shall be payable by NTPC. Article 10.4 clearly provisions for a Payment Security Mechanism (LC) which as a matter of fact has not been provided to the Petitioner till date. Article 10.7 of the PPA that Petitioners may raise a "Supplementary Bill" for payment on account of "Change in Law" and the same shall be payable by NTPC in a timely manner by the due date. At no point the payment of the Supplementary Bill on account of Change in Law is to be made after the amounts are received by NTPC from Respondent No. 2 to 8. Article 14.5 of the PPA itself provides NTPC to assume payments and other financial and related obligations including opening of letter of credit to the Petitioners (both of which NTPC is not in compliance of). It is much relevant to mention here that in *JSW Hydro Energy Limited vs PTC India Ltd. and others* (Petition No. 393/MP/2018) vide its order dated 06.06.2019, this Commission has further substantiated that payment obligations (i.e. monthly bills, supplementary bills, LCs, etc.) of trader qua the developer are not dependent on whether it has received the same from the ultimate buyer.

69. The Petitioners have submitted that from the PSA it is abundantly clear that NTPC has a separate and independent mechanism with the Discoms in order to secure its payments and at no place provides for a pre-condition that the payment of the Petitioner cannot be made till the time the said payments towards Tariff / Monthly Bill / Supplementary Bill are not received by NTPC.
70. The Petitioners state that NTPC has submitted that the PPA provisions for a late payment surcharge in case of delayed payments by NTPC and the due payments will be accompanied with such delayed payment surcharge and therefore the said Petition is not maintainable. Firstly, the late payment surcharge cannot be taken as a ground for non-payment and the said argument is legally flawed / impermissible. Secondly, the Petitioner is not in the business of offering a credit facility and does not earn its revenue from interest on delayed payments. The Petitioner is a solar power generator and it requires a continuous and regular inflow of funds to operate and manage its project. The judgments relied upon by the Respondent are not relevant to the facts and circumstance of the present case and no strength can be sought from the same in this regard.

Re: Directions of the Commission in Order dated 09.10.2018

71. The Petitioners have submitted that the directions of the CERC through its Order dated 09.10.2018 are unambiguous and crystal clear. The said Order nowhere provides that the payments due can be made by NTPC to the Petitioner only when the same is received by NTPC from the Discoms. In Para 244 of the Order, Respondent had made a submission to the Commission that “...*Any enforcement of the claim by the Petitioner against the Respondents without the Distribution Licensees being obligated to pay and discharge the corresponding claim under the PSA in advance of the discharge of the obligation of SECI will result in serious financial issues to SECI and thereby effect the implementation of the scheme*”. The directions of the Commission are very clear in terms of Para 349 and 375 and the same cannot be diluted or be read in any other way but for the manner in which the said directions have been passed. All the required documents backed by Auditor certificate are in accordance with Order which has been confirmed by NTPC vide its email dated 04.05.2019 and reply

filed in this matter. Therefore, Petitioners have acted as per Commission's Order and hence is entitled to get its GST claims along with applicable Late Payment Surcharge without any further delay.

Submissions by the Petitioners in the Rejoinder (Reply to Respondent No. 2 & 3)

72. The Petitioners have submitted that at the outset, the submissions/averments made by the Respondent No.2 & 3 in their reply are denied for being unsustainable, unjustifiable and devoid of merits. Additionally, the Petitioners have submitted as under:

Re: Maintainability of the present petition u/s 142 of the Act

73. The Petitioners have submitted that it is not understood as to how TSDISCOMS can assume a scenario where the Commission can have no powers to issue directions to the Respondents directing / ensuring compliance of its own Orders. The TSDISCOMS are seeking benefit of its' own wrong by not making the due payments, in complete disregard and non-compliance to the directions passed by the Commission in its Order dated 09.10.2018, which in itself calls for an action under Section 142 of the Act. In fact the payments due are sought to be paid within the terms of the Order dated 09.10.2018 and the same being genuine and verified by NTPC vide its email dated 04.04.2019. The Respondents have categorically contended that "the Petitioners are not entitled to invoke section 142 of the Act, for the ulterior purpose of seeking recovery of the money under the PPA, especially when the PPA itself provides for the consequence of non- payment of money by the prescribed time, viz. the payment of late payment surcharge". It is submitted that there can be no ulterior motive that the Petitioners have in claiming its own legitimate money.

Re: Alleged Defects raised by TSDISCOMS

74. The Petitioners have submitted that in compliance to Order dated 09.10.2018, the Respondent No. 1 i.e. NTPC was requested by the Petitioners vide then letter dated 16.11.2018 along with the requisite documents to make the payments of the Supplementary Invoices towards the

Change in Law claims pursuant to the said Order which allowed introduction of Goods and Services Tax Act, 2017 as a Change in Law and consequently, allowed claims of the Petitioners for Change in Law. Admittedly, it is only on 27.12.2018 that NTPC for the first time reverted vide its email with certain queries and objections raised by TSDISCOMS on verification of the claims of the Petitioners. The objections raised in the said email/communication dated 27.12.2018 are the same as are being alleged in the Reply by TSDISCOMS to have not been adequately responded to by the Petitioners vide letter dated 16.01.2019. This is baseless and devoid of any merits.

75. The Petitioners have submitted that, in its bonafide, vide its letter dated 16.01.2019 they have categorically responded to each and every query and on clarifications sought, by NTPC vide its email dated 27.12.2018. This bonafide of the Petitioner(s) is strengthened by the fact that the Petitioner(s) vide its email dated 04.04.2019 to the Respondent No. 1 informed that it had submitted all the necessary documents verified by Auditor's Certificate required for verification of its' claims of GST (as per the directions issued by Central Commission's Order dated 09.10.2018) and thereby sought confirmation on the verification of its claims and invoice submission to DISCOM's in Telangana and Karnataka. The Respondent No. 1 responded to the said email dated 04.04.2019 vide its email dated 04.04.2019 expressly mentioning that it had verified all the documents submitted by the Petitioner(s) herein after due diligence and accordingly billed the concerned DISCOMs i.e. both Telangana and Karnataka. Despite such confirmation by the Respondent No. 1 on the verification of the claims of the Petitioner(s), the directions passed in the said Order are neither complied with nor payment is made to the effect, which, by nature itself is non-compliance of the Order passed by the Commission.
76. The Petitioners have submitted that if the TSDISCOMS had any other objections, issues with the documents submitted by the Petitioner(s) pursuant to the details sought in this regard by the Respondent no. 1, the TSDISCOMS should have objected to or sought for further clarifications at the appropriate time and before the appropriate forum, rather than now objecting to the compliance of the same. The Petitioners are required to submit its claims under PPA to NTPC and reply to any clarification which is required by NTPC. Once NTPC

accepts the claims under PPA, the Petitioners are entitled to the claims without any further actions at the end of the Petitioners.

Re: Compliance to the Order subject to undisclosed Appeal

77. The Petitioners have submitted that the Respondent No. 2 & 3 are trying to mislead the Commission by submitting that an Appeal has been filed by NTPC against the Order of the Commission. Therefore seeking implementation of this Order is not justified. It is rather brought to the notice of the Commission that till date the Petitioners have no information or knowledge if appeal has been filed by NTPC nor any notice with regard to the same has been received by the Petitioners till date. The Respondents have also not provided in their reply any details of the appeal filed by NTPC, or if there is any stay that has been granted to NTPC against this Order. Therefore, such submission by the TSDISCOMS without proper details and information is frivolous and unsustainable in law. The Respondent No. 2 & 3 are also misleading the Commission that a delay in condonation in filing the replies is being filed with the Reply. However, no such application has been received till date.

Re: Late Payment Surcharge available to Petitioner

78. The Petitioners state that TSDISCOMS have submitted that the PPA provisions for a late payment surcharge in case of delayed payments by TSDISCOMS and the due payments will be accompanied with such delayed payment surcharge and therefore the said Petition is not maintainable. The said understanding is grossly erroneous. Firstly, the late payment surcharge cannot be taken as a ground for non- payment and the said argument is legally flawed / impermissible. Secondly, the Petitioner is not in the business of offering a credit facility and does not earn its revenue from interest on delayed payments. The Petitioner is a solar power generator and it requires a continuous and regular inflow of funds to operate and manage its project. The Respondents cannot be allowed to take advantage of their own wrong, rather than paying for it.

Re: Claims not verified by NTPC

79. The Petitioners have submitted that NTPC in its email dated 04.04.2019 has expressly confirmed and verified all the documents submitted by the Petitioners herein and accordingly billed the concerned DISCOMs i.e. both Telangana and Karnataka. Issue inter-se between NTPC and DISCOMS is not to the prejudice of the Petitioners. The Petitioners have been granted a relief under the said Order dated 09.10.2018 which cannot be taken away owing to an inter-se dispute between NTPC and DISCOM, which is covered by PSA.

Hearing held on 15.10.2019

80. During the hearing held on 15.10.2019 the Petitioners and the Respondent NTPC, made extensive arguments in support of their contentions and reiterated the submissions made in their respective pleadings.

81. The Petitioner further submitted that the Respondent, NTPC is relying on para 375 of the order dated 09.10.2018 in Petitions No. 188/MP/2017 and others, wherein the Commission has observed that the amount as determined by Petitioners shall be on 'back to back' basis to be paid by Discoms to the Petitioners under the respective 'Power Sale Agreements'. The Petitioners submitted that the word 'Petitioner' in the aforesaid para is a typographical error as can be seen on harmonious reading with para 349 of the order and with due regard to the fact that the Discoms are not signatory to the PPAs between the Petitioner and NTPC. Learned senior counsel further submitted that the said order does not modify the terms of the PPAs and apart from Late Payment Surcharge, obligation of NTPC to pay under the PPAs is not subject to receipt under the PSA. In response, the Respondent, NTPC, by referring to the paras 349 and 375 of the said order, submitted that there is no typographical error as contended by the Petitioner and the Commission, after recognizing back-to-back arrangement of PPAs and PSA, has concluded that the amount determined as payable shall be on a back to back basis and paid by Discoms to the intermediary nodal agency under the respective PSAs to be remitted to the SPD under the PPAs.

82. On the request of the learned senior counsels for the parties, the Commission allowed the Petitioner and the Respondents to file their respective written submissions by 30.10.2019

with copy to each other. The Petitioners and Respondent No. 1 have filed the respective submissions on 30.10.2019. However, Respondent No.2 and 3 have not preferred to file any written submissions with the Commission.

Written Submissions of the Petitioners

83. The Petitioners vide written statements have reiterated the submissions made in the Pleadings and hence the same are not reproduced under for the sake of brevity. Additionally, the Petitioners have submitted following table showing the chronology of queries raised and responded to by the Petitioners:

A.	Observations and defects mentioned in Para 10 a-h of the Reply of TSDISCOMS	Queries raised vide NTPC's email dated	Reply by ACME dated
a.	The Solar Power Developers (SPDs) viz., M/s ACME Mahbubnagar Solar Energy Pvt. Ltd. and M/s ACME Yamunanagar Solar Power Pvt. Ltd. stated that they have engaged M/s ACME Cleantech Solutions Pvt. Ltd. as their EPC contractor and have executed contract dated 20.01.2017(recorded in CERC order Dt. 09.10.2017 at para 115). However, it is noted from the claim invoices that the GST numbers of M/s ACME Cleantech Solutions Pvt. Ltd., M/s ACME Mahbubnagar Solar Energy Pvt. Ltd. and M/s ACME Yamunanagar Solar Power Pvt. Ltd. are identical.	27.12.2019	16.01.2019
b.	The CERC order categorically directs the SPDs to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. As such, the SPDs may be requested to establish clear correlation between M/s ACME Cleantech Solutions Pvt. Ltd. and the SPDs.	27.12.2019	16.01.2019
c.	The CERC order directed NTPC/ DISCOMs to reconcile the claim made by SPDs w.e.f. 01.07.2017 qua EPC cost on the basis of the auditor's certificate as per the methodology	27.12.2019	16.01.2019

	discussed in para 338 & 348 of the order. Para - 348 of the CERC order allowed for GST @ 5% on various categories such as PV Modules, Mounting structures, Power Conditioning Unit etc., However, it is observed that SPDs have raised GST@ 18 % on certain categories. The same may be verified.		
d.	Certain claims are raised on the invoices, which are beyond SCOD viz., 18.08.2017, and as such, those claims need not be considered as per the understanding of TSDISCOMs.	27.12.2019	16.01.2019
e.	The invoices have not been accompanied with the GST receipts by the concerned Govt. Department to cross check the GST payments made.	27.12.2019	16.01.2019 and 05.02.2019
f.	Apart from these preliminary defects mentioned above it is found from the documents that even Insurance coverage for the total completed project commenced from 11.08.2017.	27.12.2019	16.01.2019
g.	The invoices shall be cross verified with the contractual agreements in respect of price based on which GST amounts are arrived.	01.03.2019 (email sent to Petitioners by NTPC which included observations of BESCOM)	28.03.2019 and 03.04.2019
h.	The execution of the SPD project has been overseen by NTPC/NVVNL as per the provisions of PPA. Hence, as such NTPC may first verify all the claim documents and furnish the breakup of claims that are allowed with detailed reasons for admitting the same duly furnishing documentary proof.	01.03.2019 (email sent to Petitioners by NTPC which included observations of BESCOM)	28.03.2019 and 03.04.2019
B.	Other queries raised by NTPC (not mentioned in TSDISCOMS Reply)	Email of NTPC dated	Reply of ACME dated
1.	GST amount not mentioned in invoice nos. SUAL0002010/1718, 02-00-00394326, 2640009467, 02-00-00397049 (ACME Rewari)	01.02.2019	05.02.2019
2.	Invoice no. 3-32-9/11 in revised annexure-1 of ACME Rewari is not matched with original invoice no.	01.02.2019	05.02.2019
3.	Documents against invoice no. 14 sought for	01.02.2019	05.02.2019

	ACME Mahbubnagar.		
1.	GST amount not mentioned in invoice nos. 02-00-00394327, 2640009466, 02-00-00395580, 02-00-0039 in case of ACME Kurukshetra (50MW)	04.02.2019	05.02.2019
2.	GST amount has not mentioned in invoice no. 02-00-00393231, 2640009437, IAR, 02-00-00394237, 264009437 in case of ACME Yamunagar.	04.02.2019	05.02.2019
3.	Basic & tax amount shown in invoice no. DR2817000050 is not matched with revised Annexure-1 of ACME Kurukshetra.	04.02.2019	05.02.2019

Written Submissions of the Respondent No. 1

84. The Respondent No.1 vide written statements have reiterated the submissions made in the pleadings hence the same are not reproduced under for the sake of brevity. Additionally the Respondent No.1 has submitted that the role of an intermediary Trader vis-à-vis a Merchant Trader has also been considered by the APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited V Haryana Electricity Regulatory Commission And Ors.* and the role of an Intermediary Trader as a ‘conduit’ has been considered by this Commission in the following cases: *Order dated 18.04.2016 in Petition No. 319/MP/2013 in the case of Tata Power Delhi Distribution Company Limited v Jhajjar Power Limited and Ors.*; *Order dated 18.01.2019 in Petition No. 224/MP/2018 in the case of M B Power (Madhya Pradesh) Limited v Uttar Pradesh Power Corporation Limited and Ors.*; *Order dated 30.04.2019 in Petition No. 255/MP/2017 in the case of Adhunik Power and Natural Resources Limited v West Bengal State Electricity Distribution Company Limited and Ors.*
85. The Respondent No.1 has submitted that in terms of the above decisions, the Commission has rejected the claim of absence of privity of contract between the Generator and the Distribution Licensee when the Generator sells the electricity to an intermediary trading company and the Trading Company re-sells the electricity on a back to back basis to the Distribution Licensee. The said two transactions being under two separate agreements, it has been held that the two agreements are inextricably linked to each other and the rights and obligations arising out of one agreement are also reflected in the other agreement. It is on the

above basis only that the Hon'ble Commission has decided on the jurisdiction to entertain the Petition filed by a generating company involving the Distribution Licensee on a sale of power through a trading company to grant the necessary relief for matters such as Penalties for shortfall in availability of contracted capacity, effect of change in law etc.

86. The Respondent No.1 has submitted that NTPC has been pursuing the recovery of the amount from the Discoms and has taken requisite steps as provided in the PSAs for recovery of the said amount including the enforcement of the Payment Security Mechanism available to NTPC. NTPC will remit the amount to the SPDs immediately upon NTPC being successful in recovering the money through the Payment Security Mechanism from respondents 2 to 8. Even if non-payment has to be considered as an NTPC event of default in terms of Article 13.2, the process and procedure available to the Petitioners in terms of Article 13.4 of the PPA is to give the requisite notice and proceed to effect termination of the PPAs. This provision also establishes that NTPC was not required to pay the amount due from its own resources for the bills raised by the Petitioners and the payment due to SPDs were essentially based on the back to back payment to be made by Respondents 2 to 8.

Analysis and Decision

87. The petition was filed on 16.05.2019 and was admitted on 04.06.2019. The Petition was reserved for Orders on 15.10.2019. We have heard the learned counsels for the Petitioners and the Respondents and have carefully perused the records. The brief facts of the case are as under:
88. The Petitioners entered into respective PPAs with NTPC for supply in the State of Karnataka and the State of Telangana. On 01.07.2017, the 'GST Law' were enacted pan India. The Petitioners filed the petitions before the Commission seeking approval of 'Change in Law' and consequential relief to compensate for the increase in capital cost due to introduction of GST Laws. On 09.10.2018, the Commission held that the enactment of 'GST laws' is covered as 'Change in Law' under Article 12 of the PPAs. The Petitioners have filed the present Petition under Section 142 of the Electricity Act, 2003 for non compliance of the Order dated 09.10.2018. The Petitioners have submitted that the Respondents may be

directed to implement the impugned Order in letter and spirit and also to pay Late Payment Surcharge as per PPAs after expiry of 60 days from the date of submission of claim. **Per Contra**, the Respondents have denied the allegations. The Respondent No. 1 has submitted that it has already forwarded the claims to Respondent No's. 2 & 3. The Respondent No's. 2 & 3 have submitted that section 142 of the Act is a penal provision and cannot be invoked for recovery of money under any Order. The Order dated 09.10.2018 provides for payment of late payment surcharge in case of delay beyond 60 days. Further, NTPC has filed Appeal before APTEL U/S 111 of the Electricity Act, 2003 which is pending for adjudication. They are also in the process of the filing the appeal. Hence the petition may be dismissed.

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

Issue No. 1: Whether the Respondents can be held in violation of Order dated 09.10.2018 in Petition Nos. 230/MP/2017, 231/MP/2017, 232/MP/2017, 233/MP/2017? And Whether the petition is maintainable under Section 142 of the Electricity Act, 2003?

Issue No. 2: Whether the Respondents should be directed to implement and fully comply with the Order dated 09.10.2018 issued by the Commission? AND

Issue No. 3: Whether the Respondents should be directed to pay Late Payment Surcharge as per PPAs from 15.01.2019 i.e. expiry of 60 days from the date of submission of claim, applicable as per Commission Order dated 09.10.2018?

90. No other issue was pressed or claimed.

91. We now discuss the issues one by one:

Issue No. 1: Whether the Respondents can be held in violation of Order dated 09.10.2018 in Petition Nos. 230/MP/2017, 231/MP/2017, 232/MP/2017, 233/MP/2017? And Whether the petition is maintainable under Section 142 of the Electricity ACT, 2003?

92. The Petitioner has submitted that the Respondents have not complied with the Order dated 09.10.2018 and as such they are in violation of compliance of the said Order and that the Commission may proceed against the Respondent No.1 under Section 142 of the Act.

Further, Late Payment Surcharge as per PPAs may also be levied on the Respondents after expiry of 60 days from the date of submission of claims. **Per Contra**, the Respondents have denied the allegations.

93. The Commission observes that vide Order dated 09.10.2018 it was held that:

“375. To sum up the:

a. Issue No. 1: The Commission has jurisdiction to adjudicate in the matter.

b. Issue No. 2: The enactment of “GST laws” is covered as “Change in Law” under Article 12 of the PPA.

c. Issue No. 3 & 4: “GST Laws” are applicable on all cases except in case of the generating company where the “actual date of Commissioning” is prior to 01.07.2017. As regards its claim (subject to threshold limit in case of Petition No. 33/MP/2018) during construction period, the Petitioners have to exhibit clear and one to one correlation between the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. In respect of PV Modules post enactment of “GST Laws” 5% will be applicable on intra state procurement as well as import by EPC or SPV. The amount as determined by Petitioners shall be on ‘back to back’ basis to be paid by DISCOMS to Petitioners under the respective “Power Sales Agreements”. The claim of the Petitioners on account of additional tax burden on “O&M” expenses (if any), is not maintainable.

d. Issue No. 5: The relief for “Change in Law” is allowed as a separate element on one time basis in a time bound manner. The Claim based on discussions in paragraph 338 & 348 of this Order shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPA.

e. Issue No. 6: The claim is to be raised as one-time upfront lumpsum payment which becomes due on the sixtieth date from the date of this Order by the Commission and after that the “late payment surcharge” as provided under PPAs is to be levied. Therefore, the claim regarding separate “Carrying Cost” in the instant petitions is not attracted.”

94. From the above, it is observed that vide issue No. 1 and issue no. 2, the Commission held that the enactment of “GST laws” was covered as “Change in Law” under Article 12 of the respective PPAs. Regarding issue Nos. 3 & 4 it was held that “GST Laws” were applicable on all cases except in case of the generating company where the “actual date of Commissioning” is prior to 01.07.2017. For claim (subject to threshold limit) during construction period, the Petitioners were to exhibit clear and one to one correlation between

the projects, the supply of goods or services and the invoices raised by the supplier of goods and services backed by auditor certificate. In respect of PV Modules 5% GST was held to be applicable on intra State procurement as well as import by EPC or SPV. The amount determined was to be paid on 'back to back' basis by DISCOMS to Petitioners under the respective Power Sale Agreements. The claims on account of "O&M" expenses were rejected. In issue No. 5 and issue no. 6, the relief for "Change in Law" was allowed as a separate element on one time basis in a time bound manner with the directions that the same shall be paid within sixty days of the date of this Order failing which it will attract late payment surcharge as provided under PPAs. Claim regarding separate Carrying Cost was rejected.

95. The Commission notes that Section 142 of the Electricity Act, 2003 stipulates that:

"Section 142. (Punishment for non-compliance of directions by Appropriate Commission):

In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction."

From the above, the Commission observes that Section 142 of the Electricity Act is a penal provision and is applicable as a punishment for non-compliance of a direction of the Commission. For invoking Section 142 of the Electricity Act, 2003, the offence of non-compliance of the Order has to be proved on records.

96. As already seen in the preceding paragraphs, the Petitioners were bound to raise the audited claims which were to be paid by the Respondents to the Respondent No. 1 and in turn the Respondent No. 1 was supposed to pay the same to the Petitioners within the sixty days of the

date of the Order dated 09.10.2018 failing which late payment surcharge was to be levied as provided under respective PPAs. Therefore, the responsibility of implementation of the Order dated 09.10.2018 was mutual. The Petitioners were to raise valid claims and the Respondents were to pay as per above mechanism within sixty days of the claim failing which the Petitioners were free to levy Late Surcharge Charges on the Respondents as per provisions of the PPAs. Further, in case of any dispute, the contracting parties had the liberty to approach this Commission as was also held vide Order dated 13/SM/2017 dated 14.03.2018 as under:

“35.In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc.in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission.”

97. The Commission notes that none of the Respondents have refused payments to the Petitioners. The Respondent No.1 has already answered all the queries raised by Respondent Nos. 2 to 8 and also finally raised the claims with Respondent Nos. 2 to 8 on different dates. The Respondents Nos. 2 to 8 have suggested that the Petitioners may proceed to levy the Late Payment charges as per the provisions of the respective PPAs and raise the bills accordingly. In view of above, the Commission holds that the Respondents cannot be held in violation of Order dated 09.10.2018. Therefore, the issue regarding maintainability of petition under Section 142 of the Electricity Act, 2003 is decided against the Petitioners.

Issue No. 2: Whether the Respondents should be directed to implement and fully comply with the Order dated 09.10.2018 issued by the Commission?

AND

Issue No. 3: Whether the Respondents should be directed to pay Late Payment Surcharge as per PPAs from 15.01.2019 i.e. expiry of 60 days from the date of submission of claim, applicable as per Commission Order dated 09.10.2018?

98. Since issue No. 2 and issue no. 3 are interrelated, the same are taken up for discussions together.

99. In the instant petitions, the Commission notes that the Petitioners sent invoices of claims alongwith the Auditor's Certificate to NTPC vide letter dated 16.11.2018. NTPC forwarded the said claims to the Respondent Nos. 2 & 3 on 22.11.2018. In response to the letter, BESCOM (Respondent No. 4) and Respondent Nos. 2 and 3 raised certain queries and sought for additional data vide letter dated 14.01.2019 and 17.12.2018 respectively. On 16.01.2019, the Petitioners sent rectified invoices incorporating the queries of the Discoms to NTPC. On 18.01.2019/21.01.2019, the Petitioners wrote to NTPC with a copy to Discom requesting for release of payment. On 04.02.2019/05.02.2019, NTPC wrote to the Petitioners raising certain errors in the claims for ACME Kurukshetra. In response to this communication, the Petitioners sent revised claim and revised CA certificates. On 15.02.2019, the Petitioners requested NTPC to update the status of payment and proposal for tariff increment. On 28.02.2019, NTPC after due verification at its end, raised the bill on the Karnataka Discoms. On 01.03.2019, BESCOM (Respondent No. 4) sought clarification in respect of the amount claimed by the Petitioners. Subsequently, a meeting was held on 19.03.2019 between the Petitioners and NTPC to discuss the issue of payment. On 03.04.2019, the Petitioners gave a point wise clarification in respect of queries sought by BESCOM. On 10.04.2019, a supplementary invoice was again raised by the Petitioners. NTPC sent repeated reminders between 10.05.2019-27.05.2019 to the Discoms to pay the amount as per the bills raised on 28.02.2019. However, the Respondents Nos. 2 to 8 failed to honour the claims raised by the Petitioners.
100. The Commission observes that in the judgment dated 26.12.2017, the Hon'ble High Court of Jammu And Kashmir in the matter *Industries Employees And ... vs Sh. Shalinder Kumar & Anr.* has held that:

“19. Firstly, the respondents have consumed lot of time in implementing the judgment. Then while finding no escape route, in principle they have taken decision to implement the judgment which they have done partly by according sanction for extension of pensionary benefits but made it blunt by prescribing conditional mode for implementation. These types of tactics are unacceptable. No authority, how high or whosoever may be, can sit over the judgment of the Court. Quite strange, the judgment dated 12.03.2009 has attained finality but it has not been implemented in its real spirit.

20. *Non-implementation of the judgment in its real spirit either is deliberate or is with some design to satisfy the ego.*

21. *In our Constitutional scheme, a person has a right to fight for his rights and also to fight against any discrimination. When a person fights for his rights by having recourse to litigation and when he finally succeeds, he cannot be deprived of reaping the fruits of successful litigation.”*

101. From the above, the Commission notes that the Order has to be implemented in its real spirit. Any person cannot be deprived of the legal claims. The delay and laches in implementation of the Order is an abuse of legal process. In the instant case, the Commission notes that the Petitioners viz. ACME Mahbubnagar and ACME Yamunanagar had entered into respective PPAs with NTPC for supply in the State of Telangana and they have successfully lodged the claims with the NTPC on 16.01.2019. Further, the Petitioners viz. ACME Kurukshetra and ACME Rewari had entered into respective PPAs with NTPC for supply in the State of Karnataka and they have successfully raised the claims with NTPC on 28.02.2019. Further, NTPC has raised the final claim with the Respondents Nos. 2 to 8 on 28.02.2019.

102. Before coming to the issue of the payment mechanism to be adopted by the contracting parties, the Commission feels that it is important to address the issue raised in the petitions regarding ‘obligations and liabilities of NTPC to the Petitioners and on a ‘back to back’ basis obligations to be performed and liabilities to be discharged by the concerned Respondent Buying Entities’.

103. The Commission observes that APTEL in its Judgment dated 04.11.2011 in Appeal No. 15 of 2011 in the case of *Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors*, has, inter alia, held as under:

“18. The trading activity has been recognized as a distinct activity under the Act. The statement of objects and reasons of the Act provides as under:

“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary”.

19. The term trading has been defined in Section 2 (71) of the Act as under:

“(71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;

20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1) (j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:

“66. Development of market. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard”

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

.....

24. In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.

25. According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).

26. Now let us see as to whether there has been nexus between the PPA and PSA.

.....

38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those

clauses are reproduced herein:

“(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.

(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement”. {emphasis added}

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

.....

42. Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.

.....

50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant’s project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.

.....

55. It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:



“Recital C-

PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA) on 19th October, 2005 as amended further vide an amendment agreement dated 18th September, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project”.

56. In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC’s obligation to participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.

57. As per clause 4.2 (i), it was the purchaser’s obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2).”

104. From the above, the Commission is of the view that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Petitioners which are the power generators and the Respondents which are the Discoms and ultimate beneficiaries of the PPA as well as parties to the PSA. The back to back nature of the PPA and PSA implies that the Respondent Discoms are liable to pay to the Respondent NTPC all that the said Respondent NTPC has to pay to the Petitioners. However, in so far as payment mechanism is considered, the issue raised for decision of the Commission was as to whether in view of the back to back nature of PPA and PSA, NTPC was liable to pay to the Petitioners only when/if the Respondent Discoms make payment to the Respondent NTPC. In this context, the Commission notes the Provisions of Article 10 of PPA and Article 6 of PSA.

105. Article 10 of the PPAs stipulates that:

“10 ARTICLE 10: BILLING AND PAYMENT

10.1 General

1.0.1.1 From the commencement of supply of power, NTPC shall pay to the SPD the monthly Tariff Payments, in accordance with this Article and Article 9. All Payments by NTPC shall be in Indian Rupees.

10.2 Delivery and Content of Monthly Bills/Supplementary Bills

1.0.2.1 The SPD shall issue to NTPC a signed Monthly Bill/Supplementary Bill for the immediately preceding Month between the 5th day & up to the 15th day of the next-Month. In case the Monthly Bill/Supplementary Bill for the immediately preceding Month is issued after the 15 day of the next Month, the Due Date for payment of such Monthly Bill/ Supplementary Bill shall be as detailed at Article 10.3.1 below,

Each Monthly Bill shall include all charges as per this Agreement for the energy supplied for the relevant Month based on Energy Accounts issued by RLDC/SLDC or any other competent authority which shall be binding on both the Parties. The Monthly Bill amount shall be the product of the energy metered and the applicable tariff.

10.3 Payment of Monthly Bills

10.3.1 NTPC shall pay the amount payable under the Monthly Bill/Supplementary Bill by the (fifth) 5th day of the immediately succeeding Month (the Due Date) in which the Monthly Bill/ Supplementary Bill is issued by the SPD to the NTPC to such account of the SPD, as shall have been previously notified by the SPD in accordance with Article 10.3.2 (iii) below. In case the Monthly Bill or any other bill, including a Supplementary Bill is issued after the (fifteenth) 15th day of the next month, the Due Date for payment would be (fifth) 5th day of the next month to the succeeding Month.

10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:

- i) deductions required by the Law; and*
- ii) amounts claimed by NTPC, if any, from the SPD, through an invoice to be payable by the SPD, and not disputed by the SPD within fifteen (15) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed. It is clarified that NTPC shall be entitled to claim any set off or deduction under this Article, after expiry of the said fifteen (15) Days period.*
- iii) The SPD shall open a bank account at Gurgaon (the "SPD's Designated Account") for all Tariff Payments (including Supplementary Bills) to be made by NTPC to the SPD, and notify NTPC of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. NTPC shall also designate a bank account at New Delhi ("NTPC's Designated Account") for payments to be made by the SPD to NTPC, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. NTPC and the SPD shall*

instruct their respective bankers to make all payments under this agreement to the SPD' Designated Account or NTPC's Designated Account, as the case may be. and shall notify either Party of such instructions on the same day.

iv) Performance Guarantee Deposit (PGD) @Rs 10 lakh/MW shall be raised in two years by deducting from payments to SPDs in 24 equal instalments. It will stay with NTPC for 25 years. POD shall be refunded to SPDs without interest within three (3) months after expiry of 25 year term of PPA subject to satisfactory performance of the project. In case the SPD winds up his project or terminates PPA prior to completion of 25 year term of PPA the PGD shall be forfeited.

10.3.3 Late Payment Surcharge

In the event of delay in payment of a Monthly Bill by NTPC within thirty (30) days beyond its Due Date, a Late Payment Surcharge shall be payable to the SPD at the rate of 1.25% per month on the outstanding amount calculated on a day to day basis subject to such late payment is duly received by NTPC under the PSA. The Late Payment Surcharge shall be claimed by the SPD through the Supplementary Bill.

106. Further, Article 6 of the PSA stipulates as under: -

“6 ARTICLE 6: BILLING AND PAYMENT

6.1 General

6.1.1 From the commencement of supply of power by NTPC, the Discom shall pay to NTPC the monthly Tariff Payments, on or before the Due Date, in accordance with Tariff as specified in Article 5. All Tariff Payments by the Discom shall be in Indian Rupees.

6.2 Delivery and Content of Monthly Bills

6.2.1 NTPC shall issue to the Discom a signed Monthly Bill on the last Business Day of the Month.

6.2.2 The Monthly Bill prepared as detailed in Schedule-1 of the PSA shall include the following;

- i) Provisional Bill for Bundled Power Supplied in the Month;*
- ii) (a) Adjustments against the Provisional Bill(s) based on Energy Accounts for the Bundled Power Supplied in the preceding month(s);*
- ii) (b) Any other adjustments to cover changes in tariff of NTPC Power, open access related charges and any other prior-period adjustments;*
- iii) Late Payment Surcharge, if any; and*
- iv) Taxes, Duties, Levies etc. as applicable.*

6.3 Payment of Monthly Bills

6.3.1 The Discom shall pay the amount payable under the Monthly Bill on the Due Date to such account of NTPC, as shall have been previously notified to the Discom in accordance with Article 6.3.2 below.

6.3.2. *NTPC shall open a bank account at New Delhi C'NTPC's Designated Account") for all Tariff Payments to be made by the Discom to NTPC, and notify the Discom of the such account at least ninety (90) Days before the dispatch of the first Monthly Bill...."*

107. From the above, the Commission observes that the billing and payment between the Petitioner and the Respondent NTPC are not conditional upon billing and payment between the Respondent NTPC and the Respondent Discoms. Although, the above provisions (Article 10 of PPA and Article 6 of PSA) deal with regular monthly tariffs, the underlying philosophy that the billing and payment of one leg is not conditional upon the billing and payment of the other leg, can be applied to the payment towards incremental impact on account of GST being a change in law, as well. It is pertinent to mention here that in the hearing held on 15.10.2019, the Respondent NTPC relied on para 375 of the order dated 09.10.2018 of the commission in petition No. 188/MP/2017 and others to argue that the liability of NTPC to pay to the Petitioner is conditional upon payment by Respondent Discoms to NTPC. The Commission notes that Para 375 is in fact the summary of the decisions in the aforesaid petitions in the said Order. The Commission observes that the substantive decision of the Commission finds mention in para 349 of the aforesaid order dated 09.10.2018 where the Commission held that *"accordingly, the amount determined is payable by petitioners shall be on back to back basis be paid by Discoms to intermediary Nodal Agency under the respective Power Sale Agreement (PSA)."* In view of the above, Commission holds that the Power Purchase Agreement and Power Sale Agreement being back to back in nature are interconnected implying thereby that the Respondent Discoms are liable to pay to the Respondent NTPC all that the said Respondent NTPC has to pay to the Petitioner. However, payment to the Petitioner by Respondent NTPC is not conditional upon the payment to be made by the Respondent Discoms to Respondent NTPC. The Commission having held that GST is a change in law, the Respondent NTPC is liable to pay to the Petitioners as per the decisions of the Commission contained in its order dated 09.10.2018 in petition No. 188/MP/2017 & Others and claim the same from the Respondent Discoms on back to back basis.

108. The above decision shall also be applicable in the similar cases in which the Commission has already allowed “GST laws” as ‘Change in law’ under Article 12 of the PPAs.
109. Accordingly, the Respondent NTPC is directed to pay the due claim to petitioner alongwith late payment surcharge through supplementary invoices within 30 days date of the order and claim the same from respondent Discoms.
110. Accordingly, the Petition No. 138/MP/2019 is disposed of in terms of the above.

Sd/-

आई. एस. झा
सदस्य

Sd/-

डॉ एम. के. अय्यर
सदस्य

Sd/-

पी. के. पुजारी
अध्यक्ष