

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No.173/MP/2019
along with IA No. 67/IA/2020**

Coram:

**Shri I. S.Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of Order: 6th September, 2022

In the matter of:

Petition under Section 79(1)(b), 79(1)(f) and 79(1)(k) of the Electricity Act, 2003, read with Articles 8.3.5, 8.4.3 and 8.4.11 of the Power Purchase Agreement dated 23.8.2013 and the amended Power Purchase Agreement dated 10.12.2013 executed between the Petitioner and the Respondent TANGEDCO seeking payment of outstanding amount on account of (i) late payment surcharge; (ii) additional interest, and for furnishing of Standby Letter of Credit as payment security mechanism.

And

In the matter of:

Bharat Aluminium Company Limited,
BALCO Nagar, Korba -495 684
Chhattisgarh.

....Petitioner

Versus

1. Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002, Tamil Nadu.

2. Kerala State Electricity Board,
Vydyuthi Bhavanam,
Pattom,
Thiruvananthapuram – 695 054, Kerala.

....Respondents

Parties Present:

Shri Hemant Singh, Advocate, BALCO
Shri Lakshyajit Singh Bagdwal, Advocate, BALCO
Ms. Alchi Thapliyal, Advocate, BALCO
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The present Petition has been filed by the Petitioner, Bharat Aluminium Company Limited ("BALCO") under Section 79(1)(b), Section 79(1)(f) and Section 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as "the Act") read with Article 8.3.5, Article 8.4.3 and Article 8.4.11 of the Power Purchase Agreement ("PPA") dated 23.8.2013 and Amended PPA dated 10.12.2013 executed between the Petitioner and the Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited ("TANGEDCO") seeking appropriate direction upon TANGEDCO for releasing the outstanding payment accrued in favour of the Petitioner on account of non-payment of Late Payment Surcharge ("LPS") along with applicable interest and for furnishing of standby Letter of Credit as payment security mechanism in terms of the PPA. The Petitioner has made the following prayers:

"(a) direct the Respondent/ TANGEDCO to make payment to the Petitioner of Rs. 46.83 Crores towards the Late Payment Surcharge in terms of Article 8.3.5 of the PPA, as raised under the Supplementary Bills, as detailed in Annexure P-3 (Colly.) of the present petition;

(b) direct the Respondent/ TANGEDCO to make payment to the Petitioner towards the interest applicable, as calculated in terms of Article 8.4.3 of the PPA;

(c) direct the Respondent/ TANGEDCO to make payment of the Late Payment Surcharge, along with applicable interest, in the event of default in making such payment by the Respondent in future;

(d) direct the Respondent/ TANGEDCO to furnish the Stand by Letter of Credit towards the payment security mechanism in terms of Article 8.4.11 of the PPA;

(e) in the interim, direct the Respondent No. 1/ TANGEDCO to release 80% of the outstanding amount towards Late Payment Surcharge; and

(f) pass any other order as this Commission may deem fit in the facts and circumstances of the present case and in the interest of justice."

2. The Petitioner is a generating company within the meaning of Section 2(28) of the Act and has set up a coal based thermal power plants of 810 MW (4x67.5 MW + 4x135 MW) and 1200 MW at Balco Nagar, Korba in the State of Chhattisgarh. The

Petitioner has entered into PPA dated 23.8.2013 for supply of 100 MW Round-The-Clock power to TANGEDCO, a distribution licensee within the meaning of Section 2(17) of the Act in the State of Tamil Nadu, for a period of 15 years commencing from 1.2.2014 to 30.9.2028. The said PPA came to be amended on 10.12.2013 through Addendum No.1, wherein the original total quantum of 100 MW was amended/enhanced to 200 MW. The Petitioner started supply of power of first 100 MW to TANGEDCO on 3.9.2015 and the additional/balance quantum of 100 MW started w.e.f. 1.12.2015.

3. The Petitioner has mainly submitted as under:

(a) As per the definition of "Due Date" read with provisions contained under Article 8.3.1 of the PPA, TANGEDCO is obliged to make payment of monthly bills within a period of 30 days from the receipt of such monthly bills raised by the Petitioner towards supply of power. In the event, payment of monthly bills is not made before the expiry of "Due Date", then LPS becomes payable by TANGEDCO to the Petitioner at the rate mentioned under Article 8.3.5 of the PPA. As provided in the PPA, LPS is claimed by the Petitioner through the supplementary bills.

(b) In addition to the entitlement to claim LPS, as per Article 8.4.3 of the PPA, the Petitioner is entitled to claim interest on the outstanding amount of the supplementary bills at the rate equal to SBI-PLR, which is to be calculated for each day of delay in making payment of such supplementary bills. Thus, in the event the principal amount is delayed, then LPS is levied and in the event if supplementary bills containing LPS are also delayed, then additional interest is also levied upon TANGEDCO.

(c) The Petitioner is supplying power to TANGEDCO since the month of September, 2015 and accordingly, the monthly bills have been regularly raised up on TANGEDCO for supply of power under the PPA. However, TANGEDCO has failed to make payment of monthly bills before the expiry of "Due Date". Consequently, the Petitioner has raised various supplementary bills towards the

LPS applicable on the delayed payment of monthly bills. However, TANGEDCO has not made any payment against the supplementary bills raised towards LPS for delay in making payment of monthly bills. This also entitles the Petitioner to levy an additional interest towards non-payment of principal amount and/or LPS amount, or both.

(d) Since the start of supply of power by the Petitioner in the month of September, 2015, TANGEDCO except for the monthly bills raised in the month of October, 2015 and November, 2015, has regularly failed to make payment of monthly bills before the expiry of "Due Date" of such monthly bills. There is an average delay of more than 90 days in making payment of the monthly bills and such enormous and continuous delay is causing prejudice to the operation and maintenance of the Petitioner's Power Plant which results in affecting its ability to meet the debt service obligation.

(e) The Petitioner has been regularly raising Supplementary Bills towards LPS. However, TANGEDCO has not paid even a single Rupee against such Supplementary Bills. There is an outstanding of Rs. 46.83 crore against the Supplementary Bills raised by the Petitioner towards LPS as applicable in terms of the provisions contained in Article 8.3.5 of the PPA. The delay in making payment of supplementary bills also entitles the Petitioner to claim interest in terms of the provisions of Article 8.4.3 of the PPA.

(f) Instead of making payment of outstanding supplementary bills and additional interest accrued thereon, TANGEDCO vide its letters dated 7.2.2017, dated 27.4.2017 and dated 27.11.2017 repeatedly requested the Petitioner for waiver of LPS. Since, the Petitioner is facing severe financial hardships due to delay in payment of monthly bills as well as the supplementary bills, such request for waiver of LPS was not entertained by the Petitioner.

(g) In terms of Article 8.4.11 of the PPA, TANGEDCO is required to furnish a Standby Letter of Credit towards payment security mechanism in favour of the Petitioner as provided therein. Despite the several requests, TANGEDCO has failed to furnish the Standby Letter of Credit which is in clear violation and gross disobedience of the contractual terms as agreed between the parties under the PPA.

(h) On account of failure to pay the monthly bill or supplementary bill within the “Due Date”, the Petitioner is entitled to invoke the Standby Letter of Credit as per Article 8.4.11.4 of the PPA. However, in the present case, since TANGEDCO has failed to furnish the Standby Letter of Credit, the Petitioner is unable to enforce its contractual right in the event of delay in payment of Monthly Bill or Supplementary Bills within the Due Date.

(i) Accordingly, the Petitioner has been constrained to approach this Commission seeking appropriate directions upon TANGEDCO to make payments in terms of the supplementary bills raised on account of LPS along with applicable interest and to furnish the Standby Letter of Credit towards the payment security mechanism in terms of Article 8.3.5 read with Articles 8.4.3 and 8.4.11 of the PPA.

(j) It is a settled position of law that party in default of making payment at the right time shall necessarily compensate the other party. Therefore, issue of LPS has already been settled and as such the Petitioner is entitled for payment of LPS along with the applicable interest in terms of the provisions of the PPA.

(k) Non-payment of LPS is causing undue financial hardship to the Petitioner inasmuch as the Petitioner is facing difficulty to arrange the working capital and to meet its other contractual obligations without there being any default on its part. The operation and viability of the Petitioner’s Power Plant is becoming difficult with each passing day. The amount of LPS due and payable to the Petitioner has never been disputed by TANGEDCO as the same are the agreed terms and conditions of the PPA.

(l) The generating station of the Petitioner has a composite scheme under Section 79(1)(b) of the Act inasmuch as it has long-term PPAs in more than one State and the present Petition has been filed seeking directions upon TANGEDCO for payment of LPS along with applicable interest and for opening of LC which are directly related to the tariff of the Petitioner. Thus, the Commission has the necessary jurisdiction to adjudicate the present Petition.

IA No. 67/IA/2020

4. The Petitioner also moved IA No. 67/IA/2020 in the matter for placing on record the additional documents. In the said IA, the Petitioner has stated that at the

time of filing of the Petition, the Petitioner, under prayer (a), has sought for a direction against TANGEDCO to make payment of Rs. 46.83 crore towards LPS, which was the outstanding amount accrued in favour of the Petitioner till the month of June, 2018 and accordingly, the Petitioner has placed on record all the bills against which the payment of LPS has been prayed for before the Commission. Further, under prayer (c), the Petitioner has prayed for direction against TANGEDCO to make the payment of LPS along with applicable interest in the future. The Petitioner has submitted that during the course of present litigation, the Petitioner issued subsequent bills from the month of July, 2018 to April, 2020 which have not been paid by TANGEDCO and as such the total outstanding LPS amount accrued in favour of the Petitioner, on the date of filing of the IA, amounts to Rs. 132.98 crore [Rs. 46.83 crore (upto June, 2018) + 86.04 crore (from July, 2018 to April, 2020)]. Accordingly, vide the present IA, the Petitioner has sought to bring on record the above subsequent developments/ copy of bills/invoice raised by the Petitioner and further prayed that the amount of Rs. 132.98 crore be treated as the outstanding liability of TANGEDCO towards payment of LPS to the Petitioner in terms of the prayer (c) of the present Petition as on the date of filing of the present application.

Hearing dated 22.8.2019

5. The matter was admitted on 22.8.2019 and the parties were directed to complete the pleadings in the matter. Pursuant to the above, TANGEDCO and the Petitioner have filed their respective reply and rejoinder in the matter as detailed below.

Reply of TANGEDCO

6. The Respondent, TANGEDCO vide its reply dated 29.9.2020, has mainly submitted as under:

(a) As to the claim of LPS, as TANGEDCO was facing severe financial hardships vide letters dated 27.4.2017 and dated 27.11.2017, it requested the Petitioner for waiver of LPS. However, the said request of TANGEDCO was not accepted by the Petitioner.

(b) The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs. 3200 crore and tariff subsidy from the Government of Tamil Nadu is around Rs. 600 crore per month. At the same time, the monthly outflow towards the various revenue expenditure is approximately Rs. 5150 crore. Since, there is an average shortfall of about Rs. 1350 crore, some payments are postponed and made as and when loans are received from REC/PFC/IREDCO and other financial institutions.

(c) Due to Covid-19 pandemic, the revenue collections to TANGEDCO has also gone down and with great hardships, TANGEDCO is maintaining the payment of 50% of the thermal generators under LTA, MTOA and STOA for the months from March, 2020 to June, 2020. Government of India has announced a financial assistance package to the tune of Rs. 90,000 crore through REC and PFC and TANGEDCO has requested the assistance to the tune of Rs. 32000 crore through Government of Tamil Nadu, which is pending approval before the Ministry of Power and the disbursement to TANGEDCO is expected during the month of September, 2020. On receipt of the financial assistance, the pending energy bills, POC bills and bills on LPS will be cleared.

(d) Regarding interest on delayed payment in respect of the generators, TANGEDCO is agreeing for payment of 50% of the surcharge due to the generators as eligible by the PPA. The action is being taken to clear the dues with regard to the principal as well as the interest at the earliest.

(e) As to the payment security mechanism, TANGEDCO has issued a Standby Letter of Credit for a value of Rs. 48.36 crore on 28.7.2019 based on the Ministry of Power's order dated 28.6.2020 wherein the Ministry of Power has issued guidelines for maintenance of adequate Letter of Credit as payment security mechanism under the PPA by the distribution licensees. In compliance with the MoP order, TANGEDCO has issued Standby Letter of Credit to the Petitioner on 28.7.2019 and TANGEDCO has to renew the above LC values as per Article

8.4.11.2(ii) of the PPA by extending the validity of Standby Letter of Credit for an amount equal to 1.1 times of the average of the monthly power purchase payments of the previous contract year. Therefore, the LC was renewed on 28.7.2020 for a value of Rs. 60.98 crore.

(f) The Petitioner may be directed to revise the computation of LPS in line with MoP instruction dated 20.8.2020 regarding LPS. On receipt of the same, TANGEDCO on negotiation and reconciliation with the Petitioner shall make arrangements to settle the dues.

Rejoinder of the Petitioner

7. The Petitioner, vide its rejoinder dated 19.1.2021, has mainly submitted as under:

(a) Since, TANGEDCO has taken a mercy argument of alleged cash flow issues, a discount ought to be offered by the Petitioner. However, there is no provision under the PPA which provides that the obligations contained therein will not be adhered in the event there is financial constraint. TANGEDCO cannot be allowed to raise such issues as the payment has been pending since 2015. When the TANGEDCO has admitted to pay surcharge in terms of the provisions of the PPA, then it has no right to create any conditions as to agreeing for payment of only 50% of the disputed claim.

(b) As to the alleged average monthly shortfall of Rs. 1350 crore, it pertinent to note that TANGEDCO has not been filing the tariff petition timely due to which the payment incurred towards supply of power by the generator is withheld since a long time on account of which the generators are made to suffer financial crunch. For the default of TANGEDCO to file tariff petitions, the Petitioner cannot be made to suffer.

(c) In terms of Article 8.3.5, Article 8.4.3 and Article 8.4.11 of the PPA, the Petitioner is legally entitled for claiming LPS and additional interest on account of failure on the part of TANGEDCO in making payments of monthly bills. Hence, TAGNEDCO cannot be permitted to wriggle out of its obligation to make payment in terms of the provisions contemplated under the PPA under the guise of misplaced arguments.

(d) The Commission vide its order dated 8.1.2020 in Petition No. 22/MP/2019 in the matter of DB Power Ltd. v. TANGEDCO and Ors. has directed TANGEDCO to pay the LPS within three months. In line with the said order, TANGEDCO ought to be directed to pay the disputed claim of LPS and additional interest, forthwith as per the bills raised by the Petitioner. TANGEDCO in its reply has acknowledged the claim of the Petitioner, however, it has refused to discharge the same.

(e) The contention of TANGEDCO that based upon the MoP's orders dated 28.7.2019 and dated 28.6.2020 it needs to maintain an adequate LC as payment security mechanism has no basis at all. The said guidelines issued by the Ministry of Power is advisory in nature and not binding. Therefore, it may be applicable only when the dispute is involved under Section 62 of the Act whereas the present case concerns with regard to the Section 63 of the Act, which is a TBCB route. Hence, the argument of TANGEDCO ought to be rejected.

(f) TANGEDCO has also sought directions from the Commission to revise the computation of LPS in line with the instruction of Ministry of Power dated 20.8.2020 and requested for reconciliation with the Petitioner. The reliance of TANGEDCO on the said MoP Notification is baseless and devoid of merits. The framework qua LPS is provided under Article 8.3.5 of the PPA which has been executed under Section 63 of the Act and approved by Tamil Nadu Electricity Regulatory Commission. Further, the aforesaid MoP Notification is an advisory issued under Section 107 of the Act and it is not binding. In this regard, reference is made to the judgment of APTEL in Appeal Nos. 41, 42 & 43 of 2010 in the matter of Polyplex Corporation Ltd. v. UPERC and Anr. and batch., whereby it has been held that policy directives under Section 108 are not binding upon a State Commission. Similar interpretation has to be given to the advisory issued under Section 107 of the Act. TANGEDCO is liable to bear LPS strictly in accordance with Article 8.3.5 of the PPA.

Hearing dated 28.6.2022

8. During the course of hearing, learned counsel for the Petitioner submitted that out of total outstanding LPS of approximately Rs. 164 crore as on April, 2021,

TANGEDCO has paid Rs. 84 crore after the Petitioner having agreed to waive the balance amount. However, for the subsequent period, TANGEDCO has once again become liable to pay approximately Rs.15 crore towards LPS. Learned counsel added that as such TANGEDCO has not disputed outstanding amount but has failed to make the payment by citing the financial difficulties/crunch faced by it. Whereas, the learned counsel for TANGEDCO submitted that the present Petition pertains to the supplementary bills raised by the Petitioner towards LPS for the period from October, 2015 to June, 2018 only and TANGEDCO has already paid the LPS for the aforesaid period to the Petitioner. In fact, after filing of reply, TANGEDCO has cleared the LPS dues to the Petitioner upto January, 2021. Learned counsel further submitted that any subsequent dues cannot be covered under the present Petition and the Petitioner cannot keep the present Petition alive for entire term of the PPA.

9. In response, learned counsel for the Petitioner referred to the prayer (c) and submitted that in the present case, the Petitioner has also prayed for direction to TANGEDCO to make payment of LPS along with applicable interest in the event of default of making such payment by the Respondent in future. Thus, the argument of TANGEDCO that for the outstanding LPS of every subsequent month(s), the Petitioner ought to file a separate Petition, cannot sustain. Opposing the above submission, learned counsel for TANGEDCO submitted that such prayer for specific performance of contract is not maintainable in law and in this regard, reliance was placed on the Section 14(b) of the Specific Relief Act, 1963. Learned counsel also submitted that TANGEDCO is also moving for rescheduling of its dues/arrears as per the Electricity (Late Payment Surcharge and related matters) Rules, 2022. Further, in terms of the liberty granted by the Commission, TANGEDCO and the Petitioner have also filed their respective additional affidavit as detailed below.

Additional Affidavit by TANGEDCO

10. TANGEDCO, vide additional affidavit dated 13.7.2022, has mainly submitted as under:

(a) Subject matter of the present Petition pertains to claims for LPS pursuant to the supplementary bills raised for the period October, 2015 to June, 2018. Whereas, TANGEDCO has since paid and discharged all dues payable to the Petitioner in respect of the abovementioned period including towards LPS. TANGEDCO has in fact cleared all monthly bills upto September, 2021. TANGEDCO has further paid the LPS in respect of delay in payment of all bills upto January, 2021 calculated upto 31.3.2021. Thus, the claims of the Petitioner to which the subject Petition pertains stand fully satisfied and as on date, the principal grievance of the Petitioner under the present petition does not survive.

(b) Insofar as the relief with respect to Standby Letter of Credit is concerned, TANGEDCO had initially opened a Standby Letter of Credit of value Rs. 48.36 crore on 29.7.2019 in favour of the Petitioner which was valid upto 28.8.2020. Thereafter, the same was renewed with value of Rs. 60.8 crore upto 28.7.2022 and the process of renewable thereafter is already under-way.

(c) In respect of dues arising thereafter, due to the financial position of TANGEDCO exacerbated by the severe power situation in the country, TANGEDCO is seeking rescheduling of its outstanding dues as per the provisions of the Electricity (Late Payment Surcharge and related matters) Rules, 2022 ('LPSC Rules') notified by the Ministry of Power, Government of India on 3.6.2022. Communication in terms of the LPSC Rules has already been sent to the Petitioner and the said outstanding dues are liable to be rescheduled in terms of the LPSC Rules.

(d) Dues that are currently outstanding in any event pertain to a period much after the period for which the present petition relates. In any event and without prejudice to the above, even if the current outstanding dues could be said to pertain to the subject Petition, the LPSC Rules would squarely apply. This Commission vide order dated 8.7.2022 in Petition No. 199/MP/2021 (Jindal Power Ltd. v. TANGEDCO) has clearly held that Rule 5 of the LPS Rules 'expressly'

recognises the arrears/past liabilities accumulated upto the date of notification of Rules and provides for liquidation process in equal monthly instalments.

(e) The Petitioner has further prayed for a blanket direction of releasing payment which fall due in the future (prayer (c)) and in this manner, the Petitioner is seeking relief without any cause of action having arisen given that the said relief pertains to bills that have not even been raised and hence, no default or breach can be said to have occurred.

(f) For the Petitioner to be entitled to payment, it has to first supply electricity and rise bills in accordance with the PPA. The Petitioner duly performing the PPA by supplying electricity in terms thereof, being a condition precedent to performance by TANGEDCO, no relief can be granted until the Petitioner first performs the contract and until and unless there is a breach on the part of TANGEDCO. It is a well settled that an order directing specific performance is premised on a clean slate where the party seeking relief must establish on irrefutable facts, complete performance of its part of the bargain. Given the time for performance qua supply and billing in the future has not even arisen, it is not even possible for the Petitioner to demonstrate at present that it has complied with its obligations and is entitled to seek payment.

(g) Under the PPA, the raising of monthly bills and making payments in terms thereof is a matter of continuous performance until the life of the PPA. In this context, Section 14(b) of the Specific Relief Act, 1963 stipulates that a contract requiring the performance of a continuous duty which the court will not be able to supervise cannot be specifically enforced. Raising the monthly bills, reconciliation and payments thereof is a continuous process throughout the term of the contract and seeking direction of the nature sought in prayer (c) of the Petition effectively seeks that the court supervise a continuous duty, which is barred under Section 14(b) of the Specific Relief Act, 1963.

(h) Article 8 of the PPA sets out the continuing obligations with respect to raising monthly bills and making payment thereof. The terms of the PPA also contain elaborate terms and conditions as to the manner in which it is to be performed. Therefore, it is not possible for this Commission or any court to monitor and supervise the performance of the PPA, which is a continuous duty. In this regard,

reliance has been placed on the judgments of Hon'ble Supreme Court in the cases of (i) Her Highness Maharani Shantidevi P. Gaikwar v. Savjibhai Haribhai Patel, [(2001) 5 SCC 101] and (ii) Universal Petr-Chemicals Ltd. v. B.P. PLC, [(2022) 6 SCC 157] and the judgments of Hon'ble Delhi High Court in (i) Hejian Solidkey Petroleum Machinery Co. Ltd. v. Indian Oil Corporation Ltd., [2015 SCC Online Del 10770] and (ii) West Haryana Highway Projects Ltd. v. National Highway Authority of India & Ors. in OMP (I) (Comm.) No. 144 of 2020 dated 7.10.2020.

(i) Therefore, the relief sought in prayer (c) is not maintainable and as such, the grievance of the Petitioner under the present Petition does not survive considering that TANGEDCO has duly paid all amounts that have been claimed in the present Petition.

Additional Affidavit by the Petitioner

11. The Petitioner, vide additional affidavit dated 26.7.2022, has mainly submitted as under:

(a) As to the contention of TANGEDCO that the prayer (c) of the Petitioner pertains to a relief for specific performance for future payments, which cannot be claimed when there is no cause of action, this Commission, as a sector regulator having regulatory powers, on several occasions has directed to the parties to make future payments in relation to the subject matter in the said proceedings. In this regard, the reliance has been placed on (i) order dated 31.5.2021 in Petition No. 351/MP/2018 (Coastal Energy Pvt. Ltd. v. TANGEDCO and Anr.), (ii) order dated 31.5.2021 in Petition No. 380/MP/2018 (IL &FS Tamil Nadu Power Co. Ltd. v. TANGEDCO and Anr.), (iii) order dated 3.2.2020 in Petition Nos. 356/MP/2018 and 51/MP/2019 (Azure Power India Pvt. Ltd. v. SECI and Anr., (iv) order dated 20.8.2021 in Petition No. 536/MP/2020 (SECI v. Azure Power Venus Pvt. Ltd. and Ors.), and (v) order dated 25.1.2012 in Petition No. 231/MP/2011 (PGCIL v. BSEB and Ors.)

(b) From the above orders, it can be clearly seen that time and again, this Commission has passed categorical directions that the parties to the PPA should continue to make payments. As such, since various precedents have already

been set by this Commission, there remains no basis for TANGEDCO to plead that the Petitioner cannot seek a relief for future payments. Even otherwise, over the years, TANGEDCO has continuously defaulted in making payments to the generators and the generators cannot again and again approach this Commission for every default committed by TANGEDCO even when the said subject matter stands already adjudicated by this Commission.

(c) Pursuant to the invocation of LPSC Rules by TANGEDCO, the Petitioner issued a letter dated 16.7.2022 to TANGEDCO thereby giving certain rebates for full payments, including that of the invoices raised towards LPS. The response to the above letter of the Petitioner is awaited from TANGEDCO. In any event, LPSC Rules pertain to outstanding dues qua past payments. In the present case, the Petitioner with respect to prayer (c) is seeking a direction upon TANGEDCO to continue to make payment in future. As such, no reliance can be placed by TANGEDCO upon the said Rules.

Analysis and Decision

12. We have considered the submissions made by the Petitioner and the Respondent, TANGEDCO. The Petitioner has filed the instant Petition seeking directions upon the Respondent, TANGEDCO for releasing the outstanding payment accrued in favour of the Petitioner on account of non-payment of LPS along with applicable interest for delay in making payment of monthly bills and to furnish the Standby Letter of Credit in terms of the PPA. At the outset, it is noted that during the pendency of the present Petition, TANGEDCO, as confirmed by the additional affidavit dated 13.7.2022, has paid and discharged all dues payable to the Petitioner towards the monthly bills upto September, 2021 and towards the LPS in respect of delay in payment of all bills upto January, 2021, calculated upto 31.3.2021. The above submission of TANGEDCO has not been disputed by the Petitioner. In fact, during the course of hearing on 28.6.2022, learned counsel for the Petitioner also confirmed the payment of outstanding dues by TANGEDCO for the aforesaid period

after the Petitioner having agreed to waive certain balance amount. Hence, in view of the above, the prayers (a) & (b) of the Petitioner seeking directions upon TANGEDCO to pay an amount of Rs. 46.83 crores towards LPS in terms of the supplementary bills raised by the Petitioner along with the applicable interest which relate to the period from October, 2015 to June, 2018 no longer survive and have become infructuous.

13. Similarly, TANGEDCO in its additional affidavit dated 13.7.2022 has also confirmed the opening of Standby Letter of Credit for value of Rs. 48.36 crore being LC No. 0734719 LC 0000295 dated 29.7.2019 in favour of the Petitioner valid upto 28.8.2020, which was thereafter renewed with value of Rs. 60.8 crore, being valid upto 28.7.2022 and the process of further renewal is stated to be already under-way. The above aspect has also not been opposed by the Petitioner. Accordingly, the prayer (d) of the Petitioner seeking direction upon TANGEDCO to furnish the Standby Letter of Credit towards payment security mechanism also no longer survives and becomes infructuous.

14. The only issue that remains contentious between the parties is the scope of the prayer (c) of the Petitioner whereby it has sought direction upon TANGEDCO to make payment of LPS along with application interest in the event of default in making such payment by it in future. During the course of hearing on 28.6.2022, the Petitioner also pointed that even after TANGEDCO having paid the LPS in respect of delay in payment of all bills upto January, 2021, certain LPS has become due to the Petitioner for the subsequent periods and thus, the necessary directions ought to be passed upon TANGEDCO as prayed for by the Petitioner under prayer (c), which would include the outstanding LPS dues for the subsequent period as well.

15. TANGEDCO has, however, objected to the maintainability/grant of the aforesaid prayer of the Petitioner on two counts. Firstly, TANGEDCO has submitted that apart from the fact that current outstanding dues pertain to a period much after the period to which the present Petition relates, even if the current outstanding dues could be said to pertain to the subject Petition, LPSC Rules would apply under which TANGEDCO has sought to reschedule its outstanding dues in monthly instalments. TANGEDCO has also placed reliance on the Commission's order dated 8.7.2022 in Petition No. 199/MP/2021 and has submitted that in the said order, the Commission has clarified that Rule 5 of LPSC Rules "expressly" recognises the arrears/past liabilities accumulated upto the date of notification of LPSC Rules and provide for liquidation process in equal monthly instalments. Secondly, TANGEDCO has submitted that the said prayer is also not maintainable in view of Section 14(b) of the Specific Relief Act, 1963 which stipulates that a contract requiring performance of a continuous duty which court will not be able to supervise cannot be specifically enforced. It has been further submitted by TANGEDCO that raising of monthly bills, reconciliation and payment thereof is a continuous process throughout the terms of the contract and seeking direction of the nature sought in prayer (c) effectively seeks that the court supervise a continuous duty which is barred under Section 14(b) of the Specific Relief Act, 1963.

16. *Per contra*, the Petitioner has submitted this Commission, as the sector regulator having regulatory powers, on several occasion has directed the parties to make future payment in relation to the subject matter of the said proceedings and has also placed reliance on the various orders of the Commission in this regard. It is also submitted that over the years, TANGEDCO has continuously defaulted in

making the payments to the generators and the generators cannot again and again approach the Commission for every default committed by TANGEDCO even when the said subject matter stands already adjudicated by the Commission. As to the LPSC Rules, the Petitioner has submitted that the said Rules pertain to outstanding dues qua the past payment whereas in the present case, the Petitioner is seeking direction upon TANGEDCO to continue to make payment in future.

17. We have considered the submissions made by the parties. As already noted above, for the outstanding dues covered under the prayers (a) and (b) of the Petitioner, the payments have already been settled by TANGEDCO. Moreover, TANGEDCO has also settled the outstanding LPS in respect of delay in payment of all bills upto January, 2021, calculated upto 31st March, 2021. However, insofar as the subsequent LPS dues, it is pertinent to note that the Ministry of Power, Government of India has notified the Electricity (Late Payment Surcharge and related matters) Rules, 2022 which came into the effect from 3.6.2022. Rule 5 of the said Rules enables the distribution licensee(s) to liquidate its arrears/total outstanding dues including LPS upto the date of notification of the Rules in equal monthly instalments. The Commission in its order dated 8.7.2022 in Petition No. 199/MP/2021 in the matter of Jindal Power Ltd. v. TANGEDCO has taken the cognizance of the provisions of LPSC Rules including on the aspect of its applicability on the pending Petition seeking directions of this Commission upon the distribution licensee for clearance of admitted outstanding dues/arrears under the PPA. The relevant extract of the said order reads as under:

“...16. It is noted that the Respondent has neither denied the liability to pay the LPS under the aforementioned provisions of the PPAs, nor disputed the amount due and payable to the Petitioner towards LPS. It is thus clear that the Respondent is, admittedly, in default of discharging its liability towards LPS in terms of the PPAs.

Therefore, there is no dispute which is required to be adjudicated under Section 79(1)(f) of the Act in the present Petition.

17. While admitting the payment due on account of claim of LPS by the Petitioner, the Respondent has expressed difficulties being faced in payment due to the Petitioner due to severe financial hardship being faced by the Discom. We are of the view that this ground is untenable inasmuch it is settled law that financial hardship is not a ground much less a justifiable ground to not discharge its liability in terms of the contract/PPA.

18. The Respondent has submitted that Ministry of Power, Government of India has notified the LPS Rules and in terms of LPS Rules, TANGEDCO has a window of 30 days from the date of the said Rules to propose the schedule of instalments for liquidation of such arrears. Rule, 3, Rule, 4 and Rule 5 of LPS Rules provides as under:

“3. Late Payment Surcharge.- (1) Late Payment Surcharge shall be payable on the payment outstanding after the due date at the base rate of Late Payment Surcharge applicable for the period for the first month of default.

(2) The rate of Late Payment Surcharge for the successive months of default shall increase by 0.5 percent for every month of delay provided that the Late Payment Surcharge shall not be more than three per cent higher than the base rate at anytime:

Provided that the rate, at which Late Payment Surcharge shall be payable, shall not be higher than the rate of Late Payment Surcharge specified in the agreement, if any.

4. Adjustment towards Late Payment Surcharge: All payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system to a transmission licensee shall be first adjusted towards Late Payment Surcharge and thereafter, towards monthly charges, starting from the longest overdue bill.

5. Liquidation of arrears: (1) The total outstanding dues including Late Payment Surcharge upto the date of the notification of these rules shall be rescheduled and the due dates re-determined for payment by a distribution licensee in the following maximum number of equated monthly installments:-

Outstanding dues amount (in Rs. Crore)	Maximum no. of equated monthly installments (months)
Upto 500	12
501-1,000	20
1,001-2,000	28
2,001 – 4,000	34
4,001 – 10,000	40
>10,000	48

(2) The distribution licensee shall communicate, in writing, to the generating company, transmission licensee, electricity trading licensee, as the case may be, the outstanding dues and number of installments in which, the outstanding dues would be paid and this communication shall be sent within thirty days of the promulgation of these rules:

Provided that if distribution licensees fails to communicate to generating company, transmission licensee, electricity trading licensee, as the case may be, the rescheduling of dues in accordance with sub-rule (1) of rule 5 within thirty days, these provisions shall not be applicable to it:

Provided further that the distribution licensee may make payment in a month more than the equated monthly installment for the month:

Provided also that the first due date for payment of the equated monthly installment shall be the fifth day of the immediate month that comes after forty five days from notification of these rules and due date for all subsequent equated monthly installments shall be due on fifth day of date the subsequent months.

Illustration: If these rules come into effect on 10th March, 2022 then the due date of the equated monthly installment shall start from 5th May, 2022 and subsequent equated monthly installment shall be due on 5th of subsequent months i.e. 5th June, 2022 and so on:

Provided also that the payment of installment shall be done to all the concerned generating companies, transmission licensees, electricity trading licensees, as the case may be, on pro-rata basis, depending upon the proportion of their individual outstanding dues.

(3) Notwithstanding anything contained in rule 3, if the distribution licensee agrees to payment of the arrears dues as per the installment fixed under the rule, and makes timely payment of these installment then Late Payment Surcharge shall not be payable on the outstanding dues from the day of the notification of these rules.

(4) In case of delay in payment of an installment under sub-rule (1), Late Payment Surcharge shall be payable on the entire outstanding dues as on the date of notification of these rules.

(5) In case of non-rescheduling of the arrears in accordance with this rule, all payments made by the Distribution Company shall first be adjusted against the arrears.”

19. As per Rule 3 (1), LPS is payable on the payment of outstanding after due date at the base rate of LPS applicable for the period for the first month of default. As per Rule 4, all payments are required to be first adjusted towards LPS and thereafter, towards monthly charges starting from the longest overdue bill. As per Rule 5 (1) dealing with liquidation of arrears, total outstanding dues including LPS upto the date of the notification of these rules are required to be rescheduled and the due dates redetermined for payment by a distribution licensee in the equated monthly instalments. As per Rule 5 (2) of the LPS Rules, the distributions licensee is required to communicate within 30 days of promulgation of LPS Rules, in writing, to the generating company, transmission licensee, electricity trading licensee, the outstanding dues and number of instalment in which the outstanding dues would be paid in terms of Rule 5 (1), failing which the provisions of rescheduling of dues shall not be applicable to the distribution company.

20. The Respondent has submitted that LPS Rules expressly provide for rescheduling arrears that have accrued prior to the date of notification of the said Rules. The mere fact that the present petition was filed before notification of the said Rules does not dilute the applicability of the Rules in any manner. Per Contra, the Petitioner has submitted that LPS Rules would not impact the adjudicatory process initiated by the Petitioner upon filing of present Petition back in September, 2021 as the cause of action for the Petition had accrued much earlier to the date of notification of the LPS Rules. In this regard, the Petitioner has relied on the judgment of APTEL dated 5.4.2022 in OP No. 1 of 2022 and Ors. to contend that the Rules cannot stop the pending adjudicatory process where the cause of action and claims pre-date the Rules. Therefore, on this count alone, the LPS Rules cannot affect the present proceeding in any manner whatsoever.

21. We have considered the submissions of the parties. The Petitioner has submitted that APTEL in its judgment dated 5.4.2022 in the case of NRSS-XXIX Transmission Limited v. Central Electricity Regulatory Commission and Ors. has held that even procedural law does not always have retrospective effect particularly where cause of action and claims proceedings pre-date the new law. Relevant portion of above judgment is extracted as under:

61. We may add here that even if we were to adopt the view of CERC that the CIL Rules represent procedural law, we are not persuaded to accept that these Rules can stop the pending adjudicatory process in its tracks divesting the statutory authority of its jurisdiction to adjudicate in matters awaiting its decision. In Ramesh Kumar Soni v. State of Madhya Pradesh, (2013) 14 SCC 696, it was held that even procedural law does not always have retrospective effect particularly where cause of action and claims proceedings pre-date the new law. We may quote the following passage from the said decision:

“19. Even otherwise the Full Bench failed to notice the law declared by this Court in a series of pronouncements on the subject to which we may briefly refer at this stage. In Nani Gopal Mitra v. State of Bihar, AIR 1970 SC 1636, this Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure.....:

“5.It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz. that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force--(See In re a Debtor, and In re Vernazza. The same principle is embodied in Section 6 of the General Clauses Act which is to the following effect:

...

23. In Baburam v. C.C. Jacob and Ors., (1999) 3 SCC 362, this Court invoked and adopted a device for avoiding reopening of settled issues, multiplicity of proceedings and avoidable litigation. The Court said:

“5. The prospective declaration of law is a device innovated by the apex court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty-bound to apply such dictum to cases which would arise in future only. In matters where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law...”

62. The principles which emerge from the settled law governing the subject thus guide us to the effect that a statute which creates new rights, liabilities, disabilities, obligations shall be prospective in operation, unless otherwise provided, either expressly or by necessary implication. Amendments relating to procedure operate retrospectively exception being that whenever the proper procedure was adopted and proceedings concluded under the old law, the same cannot be reopened. A new law or an amendment bringing about a change in forum shall not affect cases which are concluded or are at an advanced stage since such change would cause

avoidable hardship to the parties in those cases. In cases where the consequential hardship is too great retrospective operation is withheld.”

22. APTEL in paragraph 62 of the aforesaid judgment has held that ‘a statute which creates new rights, liabilities, disabilities, obligations shall be prospective in operation, unless otherwise provided, either expressly or by necessary implication’. It is observed that Rule 5 of the LPS Rules ‘expressly’ recognizes the arrears/past liabilities accumulated upto the date of notification of Rules and provides for liquidation process in equal monthly instalments. From 3.6.2022 onwards, the LPS Rules are applicable for the Petitioner and the Petitioner cannot circumvent Rule 5 ‘Liquidation of arrears’ on account of pending adjudication of the Petition. Thus, the contention of the Petitioner that the LPS Rules are not applicable to the present case is not sustainable.”

In the aforesaid order, the Commission has recognised that Rule 5 of the LPSC Rules ‘expressly’ recognizes the arrears/ past liabilities accumulated upto the date of notification of the Rules and provides for liquidation process in equal monthly instalments. In the present case, TANGEDCO having exercised its option to reschedule its total outstanding dues including the LPS in terms of the provisions of the LPSC Rules, it would not be appropriate to issue any direction upon TANGEDCO to clear its LPS liabilities for the subsequent period under the scope of prayer (c) of the Petitioner.

18. The Petitioner has also sought to contend that LPSC Rules pertains to the outstanding dues qua past payments whereas in the under prayer (c), the Petitioner has also sought direction upon TANGEDCO to continue to make payment in future. Whereas, TANGEDCO has contended that for the Petitioner to be entitled to payment it has to first supply the power and raise bills in accordance with the PPA and no such relief can be granted until the Petitioner first performs the contract and until and unless there is a breach on the part of TANGEDCO. It is also submitted that given that the time for performance qua supply and billing in future has not even arisen, it is not possible for the Petitioner to demonstrate at present that it has complied with its obligations and it is entitled to seek the payment, which is a must for seeking an order directing specific performance. In this regard, we observe that

provisions of the PPA clearly spell out the rights and obligations of each party to the PPA and also provide for the remedial measures/actions in the event any party fails to perform its obligation in timely manner. The aggrieved party is always at liberty to take such remedial measures/actions as provided in the PPA including approaching of this Commission as and when situation so demands. However, at this juncture, we do not see any reason for passing a blanket direction to any of the party to the PPA to abide by its obligations under the PPA in future (which it in any case is contractually required to abide) without the cause having so arisen and without the aggrieved party having taken recourse to the remedial measures as provided /available to it. Such direction at this stage would indeed be pre-mature. It is pertinent to note that LPSC Rules also lay down the detailed provisions on 'Operationalizing the payment security mechanism and its consequences' and 'Regulation of access to defaulting entities' at Rule 6 and Rule 7 respectively, whereby the said Rules equip the generating companies, transmission licensees and trading licensees with various remedial actions/measures to be taken against the distribution licensee(s) in the events of non-maintenance of payment security mechanism and/or non-payment of their dues by the distribution licensee(s). Thus, the Petitioner is always at liberty to exercise its rights as made available under the LPSC Rules in the event of non-payment of its dues by TANGEDCO. This, in our view, ought to amply address the concerns of the Petitioner towards the default/delay in payment of its dues by TANGEDCO in future.

19. In view of the foregoing observations, the Petition No. 173/MP/2019 along with IA No. 67/IA/2020 stands disposed of.

Sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member