

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 108/MP/2022

Coram:

Shri Jishnu Barua, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 17.01.2024

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Articles 11 and 22 of the Agreement for Procurement of Power dated 25.10.2021 seeking directions to PTC India /Kerala State Electricity Board Limited to make payment of entire Capacity Charges to Jindal India Thermal Power Limited in terms of the APP dated 25.10.2021.

And in the matter of:

Jindal India Thermal Power Limited,

Plot No. 2, Pocket C, 2nd Floor,

Nelson Mandela Road,

Vasant Kunj, New Delhi – 110070

...Petitioner

Versus

PTC India Limited,

2nd Floor, NBCC Tower, 15,

Bhikaji Cama Place,

New Delhi – 110066

...Respondent No. 1

Kerala State Electricity Board Limited,

8th Floor, Vydyuthi Bhavanam, Pattom,

Thiruvananthapuram – 695004, Kerala

...Respondent No. 2

Parties Present :

Shri Akshat Jain, Advocate, JITPL

Ms. Shefali Tripathi, Advocate, JITPL

Shri K S Rana, Advocate, JITPL

Shri Ravi Kishore, Advocate, PTCIL

Shri Keshav Singh, Advocate, PTCIL
Shri Dhruv Tripathi, PTCIL
Shri Prabhas Bajaj, Advocate, KSEBL
Shri Priyanshu Tyagi, Advocate, KSEBL

(Order)

1. Jindal India Thermal Power Limited (JITPL) (hereinafter to be referred to as “the Petitioner”) has filed the present Petition under Section 79 of the Electricity Act, 2003, read with Articles 11 and 22 of the Agreement for Procurement of Power dated 25.10.2021 seeking directions from the Commission to PTC India /Kerala State Electricity Board Limited to make payment of entire Capacity Charges to Jindal India Thermal Power Limited in terms of the APP dated 25.10.2021. The Petitioner has made the following prayers:

(a) Direct PTC/KSEBL to make full payment of Monthly Invoice dated 03.02.2022 and 01.03.2022 based on the monthly cumulative Availability declared by JITPL for the said months along with applicable interest on deducted amounts;

(b) Direct PTC/KSEBL to make full and complete payment of the Capacity Charges to be claimed by JITPL in the future Monthly Invoices based on the monthly cumulative Availability declared by JITPL for such months (i.e., the sum of daily Availability declared by JITPL);

(c) Direct PTC/KSEBL not to deduct/withhold any amount towards Capacity Charges payable to JITPL from the future Monthly Invoices by restricting/capping JITPL’s daily Availability/Declared Capacity in such months up to a maximum of 85%.

(d) Declare that PTC’s/KSEBL’s interpretation and application of Article 11.3.2 of the APP is erroneous and incorrect;

(e) Direct PTC/KSEBL to refund the amount of Rs. 49,48,206/- illegally availed PTC/KSEBL as a rebate for Jan’22 invoice and rebate availed for Feb’22 along with applicable interest on such delayed payment;

Background:

2. JITPL has established and operates a 1200 MW (2X600 MW) Thermal Power Plant in the village of Derang, District Angul in Orissa. Unit-I and Unit-II of the Project achieved Commercial Operation Date (“**COD**”) on 06.06.2014 and 12.02.2015, respectively

3. On 30.01.2019, the Ministry of Power, Government of India (“**MoP**”), introduced Pilot Scheme-II to facilitate procurement of aggregated power of 2500 MW for three years from stressed generating companies having coal-based power plants which are already

commissioned but are without a Power Purchase Agreement.

4. On 01.02.2019, MoP vide its Resolution No. 23/78/2017-R&R issued guidelines under Section 63 of the Electricity Act for procurement of aggregated power of 2500 MW for three years (Medium Term) through competitive bidding on electronic platform (DEEP e-bidding Portal) under Pilot Scheme-II ("**Guidelines**"). The salient features of the Guidelines are as under: -

- (a) The Pilot Scheme-II envisages procurement of power through a competitive bidding process to be conducted by PFC Consulting Limited ("**PFC**") as the Nodal Agency. In order to facilitate the procurement and supply of power between the successful bidder(s) and distribution licensees, PFC has appointed PTC as the "Aggregator" under Pilot Scheme-II.
- (b) The Aggregator will sign an Agreement for Procurement of Power ("**APP**") with the successful bidder(s) and back-to-back a Power Supply Agreement ("**PSA**") with the distribution licensee(s).
- (c) Terms and conditions specified in the Bidding documents for Pilot Scheme-II shall by reference, form part of the Guidelines and shall be treated as such.
- (d) For the purpose of the APP, the tariff shall comprise (i) a variable charge and (ii) a fixed charge to be quoted by the bidders in accordance with the bidding documents.
- (e) Tariff shall be determined through a reverse auction on the DEEP e-bidding portal based on these Guidelines for the purpose of APP and PSA and shall be adopted by the Appropriate Commission in pursuance of the provisions of Section 63 of the Act.
- (f) Any deviation from the bidding documents of Pilot Scheme Phase-II during the bidding process shall be made by the Nodal Agency with prior approval of the Central Government. Any deviation from the Bidding documents of Pilot Scheme-II after the bidding process shall be made by the Nodal Agency, Aggregator or distribution licensee with the prior approval of the Appropriate Commission.

5. On 01.01.2020, PFC issued the Bidding documents along with a draft APP and PSA inviting bids/proposals in accordance with the Guidelines from generating companies for procurement of 2500 MW power under the Pilot Scheme-II through e-Tender and e-reverse auction on DEEP e-bidding portal. The last date for submission of the bid was 31.01.2020. Pursuant thereto, JITPL submitted its bid on the bid submission date, i.e. 01.02.2020, for the supply of 270 MW power from its Project.

6. On 07.02.2020, the e-reverse auction was conducted by PFC on the DEEP e-bidding portal. Pursuant thereto, JITPL was declared as one of the L1/successful bidders.

7. On 07.10.2021, Ld. Kerala State Electricity Regulatory Commission (“Ld. KSERC”) passed Order in O.P No. 44 of 2021 and *inter-alia*: -

- (a) Granted approval to KSEBL for procuring 270 MW RTC power on a medium-term basis through PTC under Pilot Scheme II for the period from January to June in a year for three years with the date of commencement of supply from 01.01.2022.
- (b) Approved the Draft Supplementary Power Supply Agreement to be signed with PTC under Pilot Scheme-II with KSEBL.
- (c) Held that the Supplementary Power Supply Agreement shall form an integral part of the PSA to be signed with the Aggregator PTC as per the Model Bidding Document of Pilot Scheme-II.

8. On 08.10.2021, PFC issued Letters of Award (“LoA”) to JITPL for the supply of 270 MW power from its Project at the tariff of Rs.3.26/kWh at JITPL’s inter-connection point.

9. On 25.10.2021, JITPL entered into an Agreement for the Sale of Power under Pilot Scheme – II with PTC for the generation and supply of 270 MW power to PTC from its Project for a period of 3 (Three) years commencing from the Appointed Date (“APP”) on finance, own and operate (“FOO”) basis.

10. On 25.10.2021, JITPL and PTC executed a Supplementary Agreement to the APP dated 25.10.2021 and mutually agreed to limit the duration of supply of RTC power of 270 MW to KSEBL from JITPL’s Project for a period of six months (i.e., 1st January to 30th June) every year for the contract period starting from 01.01.2022.

11. On 27.10.2021, PTC entered into a Power Supply Agreement (“PSA”) with KSEBL for the supply of 270 MW power to KSEBL from JITPL’s Project on a back-to-back basis. The PSA is an integral part of the APP dated 25.10.2021.

12. On 27.10.2021, PTC entered into a Supplementary Power Supply Agreement (“Supplementary PSA”) with KSEBL.

13. On 22.12.2021, CERC passed an Order in Petition No. 249/AT/2021 titled *PTC India Ltd v. PFC Consulting Limited (filed by PTC seeking adoption of tariff discovered pursuant to competitive bidding carried out by PFC under Pilot Scheme-II)* and *inter-alia*: -

- (a) Held that the tariff discovered through the DEEP e-bidding portal as per the Bidding documents for Pilot Scheme-II for procurement of power by Distribution Licenses, including KSEBL from various generating companies, including JITPL through PTC, has been carried out in conformity with the Guidelines.

(b) Adopted the tariff of Rs. 3.26/kWh under the APP dated 25.10.2021 for the supply of power by JITPL to KSEBL through PTC.

Submissions of the Petitioner:

JURISDICTION

14. JITPL's 1200 MW Power Plant is situated in the State of Orissa and is supplying power to more than one State under numerous PPAs and PSAs entered with various Distribution Licensees. Therefore, in terms of Section 79(1)(b) of the Electricity Act, JITPL has a composite scheme for the generation and sale of electricity in more than one State. Hence, this Hon'ble Commission is empowered to adjudicate the disputes relating to the tariff of JITPL's Power Plant.

15. The Petitioner JITPL has mainly submitted as follows:

a) JITPL has entered into an Agreement for Procurement of Power ("APP") on 25.10.2021 with PTC India Limited (Respondent No. 1") for generation and supply of 270 MW power to PTC from its Project for a period of 3 years (6 months only from January to June each year) for onward supply to Kerala State Electricity Board Limited ("KSEBL"/ "Respondent No. 2") under Power Supply Agreement dated 27.10.2021 ("PSA") on back-to-back basis starting from 1.1.2022.

b) The present Petition is being filed by JITPL challenging the arbitrary and unreasonable actions of PTC /KSEBL regarding: -

- Unilateral deduction of amounts from the monthly bills raised by JITPL: -

- (i) Rs. 3,76,87,289/- (Rs.3.77 crore) from the monthly Invoice dated 03.02.2022 for power supplied in January 2022 out of which Rs. 3,27,39,083/- (Rs.3.27 crore) is on account of unpaid Capacity Charges and Rs. 49,48,206/- (Rs.49.48 lakh) is on account of rebate.

- (ii) Rs. 3,20,33,447/- (Rs.3.20 crore) from the monthly Invoice dated 01.03.2022 for power supplied in February 2022.

- Unilateral reduction of JITPL's Availability for the month of January 2022 to ~140.697199 Million Units (~ 140.69 MU) instead of ~160.509673 Million Units (~160.51 MU) actually declared by JITPL. Similarly, JITPL understands that a unilateral reduction of availability has been done for February 2022 as well.

- Arbitrarily restrict/cap JITPL's daily Availability/Declared Capacity up to a maximum of 85% on a daily basis for the purpose of payment of Capacity Charge in complete violation of the APP and Electricity Act.

- Availing rebate of 1% totalling Rs. 49,48,206/- from the January 2022 bill without making full payment of the Invoice.

16. On 11.02.2022, PTC provided details (forwarding KSEBL letter dated 11.02.2022) pertaining to the amounts deducted qua payment of monthly invoice dated 03.02.2022 raised by JITPL for the power supplied during January 2022. PTC stated that:-

- (a) KSEBL has admitted an amount of Rs. 49,75,97,384/- for payment to PTC.
- (b) After deducting a rebate of 1% of the net amount and applicable TDS amount of Rs.1,88,322/-, an amount of Rs. 49,19,87,748/- has been credited to PTC's account against Monthly Invoice for January 2022. PTC, after retaining its trading margin, made a payment of Rs. 48,93,44,801/- to the Petitioner/JITPL.
- (c) The declared energy of the contracted power by PTC for the month of January 2022 is ~160.51 MU.
- (d) As per Article 11.3.2 of the APP, the aggregator shall not, for and in respect of any day, be entitled to receive payment of fixed charge for availability exceeding 85% thereof, and in the event, it supplies electricity to the Utility in excess of 85%, such excess shall be eligible only for payment of variable charge. Accordingly, the declared availability for each day has been limited to 85%.
- (e) The total quantum of energy for the payment of fixed charges has been computed as ~140.69 MU by limiting each day's declared energy to 85%. Accordingly, the fixed charge payable for January 2022 is Rs. 22,93,36,434.37/- ($\sim 140.69 \text{ MU} * 10^6 * \text{Rs. } 1.63$).

17. Further, KSEB, through its letter dated 19.02.2022 to PTC, which was forwarded to the Petitioner by PTC, communicated as with regard to payment withheld:

- a) As per Article 11.3.2 of the APP, the supplier shall not, for and in respect of any day, be entitled to receive payment of fixed charge for availability exceeding 85% thereof, and in the event, it supplies electricity to the Aggregator in excess of such 85%, such excess shall be eligible only for payment of variable charge, save and except the payment of Incentive.
- b) If the fixed charge for a day whose declared availability exceeds the Normative availability of 85%, then the declared availability for that day for calculation of Fixed charge is limited to 85% (the normative availability). An incentive of 50% of the fixed charge for availability in excess of normative availability in any month will be paid to the supplier.

- c) If the fixed charge is paid for the monthly availability after limiting the monthly availability to normative availability, i.e., 85%, double payment is being paid to the supplier for the same units of energy, i.e., one as fixed charge and the other as Incentive.

18. On 24.02.2022, JITPL (replying to PTC email containing KSEBL letter dated 19.02.2022) wrote to PTC stating that: -

(a) PTC is yet to pay an amount of Rs. 3,26,70,149/- from the Fixed Charges billed to PTC for the power supplied to KSEBL under Pilot Scheme-II in the month of January 2022.

(b) Calculation of the Fixed Charges has been done by wrongly misinterpreting certain clauses of the APP and in isolation of Articles 5.1.4, 11.1, 11.3 and 11.8.2 of the APP.

(c) JITPL, by its letter dated 15.02.2022, has made it clear that the calculation methodology adopted by PTC/KSEBL for payment of Fixed Charges is incorrect and not acceptable to JITPL.

(d) Respondent's interpretation regarding double payment for the same units is grossly wrong since PTC/KSEBL will be paying incentive only if the monthly availability is more than the Normative Availability of 85% and will be limiting the payment of Capacity Charges for only 85%. For example, if the monthly Availability for a month is 86.91%, then JITPL will be getting Fixed Charges for 85% and an incentive for 1.91% only. Hence there is no double payment in terms of Fixed Charge and incentive for the same Availability.

(e) If the same availability is being considered as per Respondent's erroneous methodology, then JITPL is only eligible for a 76% Fixed Charge and incentive for 1.91% against monthly availability of 86.91%, thereby reducing the Fixed Charges of JITPL by ~9%. This example is quoted by the Petitioner in the sample calculations furnished in the said letter.

19. It is submitted that in terms of the APP dated 25.10.2021, the Availability Based Tariff ("ABT") Mechanism and various Orders passed by the Hon'ble Appellate Tribunal for Electricity ("APTEL") and this Hon'ble Commission, payment of Capacity Charge to JITPL: -

- a) is to be made by the procurer (i.e., PTC/KSEBL) every month based on the cumulative Availability of the Power Plant as declared by JITPL in such month (i.e., the sum of daily Availability declared by JITPL for the month) to the extent of Normative Availability i.e., 85%.

- (b) Cannot be restricted/capped by limiting the daily Availability up to a maximum of 85%, irrespective of actual Availability declared by the Petitioner.

20. It is submitted that there is no provision in the APP or the Electricity Act which allows PTC/KSEBL to unilaterally restrict/reduce JITPL's monthly Availability by restricting/capping JITPL's daily Availability/Declared Capacity up to a maximum of 85% and then make the payment of Capacity Charges rather than based on actual Availability declared by Petitioner/JITPL.

d) From the above, it is evident that PTC/KSEBL will continue to unilaterally deduct the amount from the Capacity Charges to be billed/claimed by JITPL in the future invoices also by arbitrarily restricting/capping JITPL's daily Availability/Declared Capacity up to a maximum of 85% or actual whichever is lower. Based on the arbitrary and erroneous methodology being adopted by PTC/KSEBL, it is apprehended that PTC/KSEBL will continue to deduct/withhold approximately Rs. 3 Crores from each monthly bill to be raised by JITPL. It is submitted that such unilateral deduction by PTC/KSEBL, besides being violative of the APP, this Hon'ble Commission's Regulations and the Electricity Act will also put the operation of the Project in jeopardy.

21. It is submitted that in terms of the APP provisions, PTC/KSEBL is mandated to make payment of Capacity Charges to JITPL every month based on the cumulative Availability of the Power Plant as declared by JITPL (i.e., the sum of daily Availability declared by JITPL in a month) to the extent of Normative Availability i.e., 85%. Relevant provisions of the APP are discussed hereunder: -

- (a) Article 5.1.4 of the APP defines Normative Availability as 85% of the Contracted Capacity of the Power Station during each year of the Contract Period:-

"25.1 Definitions

"Normative Availability" shall have the meaning as set forth in Clause 5.1.4;

*5.1.4 The Supplier shall operate and maintain the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements **such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty-five per cent) thereof during each year of the Contract Period (the "Normative Availability").***

- (b) In terms of the Explanation provided to Article 5.1.4 of the APP, the Availability of JITPL's Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by JITPL for producing and supplying electrical energy. Thus, it is unequivocal that for every hour of the day, JITPL's Availability shall be the Availability of its Power Plant as declared by JITPL and the same cannot be restricted/capped by PTC/KSEBL:-

“Explanation:

Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Supplier for producing and supplying electrical energy equal to 1000 kWh per megawatt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses up to the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the “Availability”).....”

22. Evidently, the monthly Availability (*Yearly Availability*) shall be the total Mega-Watt Hours declared in that month (*or year, as the case may be*), and the same shall be considered for payment of Monthly Capacity Charges also as defined under 11.1.1. The said clause does not envisage the capping of JITPL’s daily Availability.

23. In terms of Article 11.1.1 read with 11.1.2 of the APP, PTC/KSEBL is mandated to pay JITPL full fixed charges (part of tariff) for Availability of the power station to the extent of Normative Availability: -

*“11.1.1 The Aggregator shall pay to the Supplier tariff comprising the sum of Fixed Charge and Variable Charge payable by the Aggregator to the Supplier for **Availability** and for supply of electricity, as the case may be, in accordance with the provisions of this Agreement (the “Tariff”).*

*11.1.2 As a part of the Tariff, the Aggregator shall pay to the Supplier an amount determined in accordance with the provisions of the Article 11 as the Fixed Charge for Availability of the Power Station to the extent of **Normative Availability** thereof (the “Fixed Charge”).”*

24. The Invoice for the supply of power is raised by JITPL on a monthly basis in terms of Article 11.8 of the APP. Hence, PTC/KSEBL is mandated to make payment of Fixed Charges as tariff for the monthly cumulative Availability up to Normative Availability as declared by JITPL during such month. It is pertinent to note that payment of Fixed Charges has to be done for the monthly Availability up to the Normative Availability and not for the daily Availability up to the Normative Availability.

25. In terms of Article 11.2 of the APP, Fixed Charges are payable for JITPL’s Availability: -

“11.2 Fixed Charge

*The Parties agree that the **Fixed Charge payable for Availability** shall, in accordance with the offer of the Supplier, be Rs. 1.63 (Rupees One Point Six Three) per kWh, which shall remain constant for the entire contract period.”*

26. This clearly shows that Fixed Charge shall be paid for **Availability** which is defined under the APP as Mega-Watt hours in a Month.

27. In terms of Article 11.3.1 of the APP, PTC/KSEBL is mandated to make payment of the Capacity Charge in an Accounting Year for an amount equal to the Capacity Charge due and payable for and in respect of the Normative Availability of 85%:-

*“11.3.1 The obligations of the Aggregator to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty-five per cent) computed with reference to the Contracted Capacity (the "Capacity Charge"). Provided, however, that in the event of Despatch of the **Power Station beyond such 85% (eighty five per cent), Incentive shall be payable in accordance with the provisions of Clause 11.5.1.**”*

28. Thus, if PTC/KSEBL restricts payment of Capacity Charges to daily Availability of 85%, then JITPL will never be able to recover Capacity Charges in an Accounting Year for Normative Availability of 85% during such year. Such cannot be the construct of the APP.

29. The concept of considering cumulative Availability for the purpose of making payment of the Fixed Charges is envisaged in Article 11.5.3 of the APP:-

*“11.5.3 The Parties expressly agree that within 30 (thirty) days of the close of every Accounting Year, the **cumulative monthly Availability** for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year. The amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.”*

30. In view of the aforesaid contractual framework, it is evident that payment of monthly Capacity Charge cannot be restricted/capped corresponding to the daily Availability up to a maximum of 85%. Hence, PTC's/KSEB's reliance on Article 11.3.2 of the APP to contend that JITPL is entitled to receive payment of Capacity Charges after limiting the daily Availability/Declared Capacity up to 85% only is arbitrary, illegal and in ignorance of other relevant provisions of the APP.

31. It is submitted that Article 11.3.2 of the APP cannot be read in isolation of other relevant provisions of the APP pertaining to computation of Plant's Availability and payment of Capacity Charges i.e., Article 5.1.4, 11.1.1, 11.1.2, 11.3.1 and 11.5.3 in terms of which PTC/KSEBL is mandated to make payment of Capacity Charges to JITPL every month based on the cumulative Availability of the Power Plant as declared by JITPL. It is a settled

position of law that a contract has to be read as a whole and cannot be given effect in bits and pieces. The reading of the contract has to be plain and literal so that each of the provisions of the contract can be given effect. In this regard, reliance is placed upon the following Judgments: -

MOH Uduman & Ors v. MOH Aslum (1991) 1 SCC 412;

Bank of India & Anr v. K. Mohandas & Anr (2009) 5 SCC 313;

Hon'ble APTEL Judgment in **Shapoorji Pallonji Energy (Gujarat) Pvt Limited v. GERC (2017) SCC Online APTEL 35** wherein it was held that the PPA must be read as whole and the provisions shall be interpreted to bring them into harmony with other provisions.

32. Hence, PTC/KSEBL's reliance on Article 11.3.2 of the APP in isolation of another clause of the APP to deny legitimate entitlement of JITPL is per-se illegal and arbitrary.

Re: ABT Mechanism

33. It is submitted that the fixed charges/capacity charges payable to JITPL correspond to the Declared Capacity ("DC") of its Project. The concept of fixed charges is the cornerstone of the Availability-Based Tariff regime in India, whereby the generating station is entitled to reimbursement of fixed costs based on the Declared Capacity of the generating station. The above position has been laid down by this Hon'ble Commission in Order dated 04.01.2000 passed in Petition No. 2/1999 ("**Order dated 04.01.2000**") as under:-

"3. Distinctive features of ABT

3.1 [...] The present bulk tariff system does recognise the total cost as consisting of two elements, namely capacity cost and energy cost. But the mechanism of charging these costs to the beneficiaries is different from the proposed ABT. In the present system, both the fixed cost and the variable cost of a generating station, are charged to the beneficiaries in proportion to the actual energy drawn by them during that period. In the proposed ABT system, the fixed charge for a period is to be pro-rated among the beneficiaries in the ratio of their entitlement for power from that station. The logic is that, the station was created for catering to these beneficiaries. Hence its fixed cost has to be borne by them according to their share in the capacity so created. As regards energy charges, they are proposed to be charged only to the extent of the scheduled drawal by the beneficiary.

[...]

As against this system, the proposed ABT system will entitle the generating station to reimbursement of fixed cost based on the availability or declared capacity of the generating station. The ABT proposal has measures to check and penalise excess/under declaration of availability."

34. It is submitted that the Explanatory Memorandum issued along with CERC (Terms and Conditions of Tariff) Regulations, 2009 dealt with the issue as under:-

“25.9 It can be seen that beneficiaries are still reckoning the measure of performance as the PLF and not the availability. It has to be appreciated that the scheduled PLF (the present criterion for incentive) depends on plant availability (which is a measure of plant personnel’s efficiency and equipment performance), as well as on requisition by beneficiaries during daily scheduling process. The requisitions by the beneficiaries depend on system’s load-generation balance and a plant’s position in merit-order (depending on its landed fuel cost). These are not within the control of generating station personnel. A lowering of scheduled PLF on account of lower requisitions by beneficiaries does not reflect and therefore must not be construed as a lowering of plant’s performance. This was also brought out clearly in the K.P. Rao Committee report also. **The perception that the measure of “service rendered” is the energy supplied by a station has to change, and the capability to supply power (which would normally be fully harnessed and utilized at least during the peak load hours) has to be accepted as the measure of service rendered.**

25.10 One of the basic objectives of Availability Tariff for generating stations is to induce maximization of plant availability. This is done by linking the fixed cost (capacity charge) payment to availability declaration. An integral feature of the scheme is that backing down of a station during off-peak hours does not adversely affect the earning of the generating company. It is these features of ABT which have streamlined the operation of regional grids in India since 2002-2003, brought about economy (merit-order) in generation, improved the grid parameters, and removed a source of perpetual conflict between Central generating companies and the State utilities. There is no reason why these features should not be extended to payment of incentive when a station achieves plant availability above the norms

...

We are of the view that that following aspects are important in this regard:

(i) If the disincentive could be in the form of denial of normative fixed charge for availability lower than the normative then the incentive could be in the form of additional fixed charge for availability in higher than the normative.

(ii) As such, recovery of fixed charge shall be on monthly basis and shall be inclusive of any incentive and disincentive depending upon the availability achieved during the month. This is a departure from the earlier practice of recovery of fixed charges linked to cumulative availability. This would allow the beneficiaries to meet any shortfall in availability (due to station being out partially or full) be met from sourcing supplies from alternate sources or over drawal from the grid at UI rates.”

35. In view of the above, the following position emerges for consideration: -

(a) As per the ABT system, the fixed charge of a generating station has to be borne by the beneficiary according to its share in the capacity of the generating station.

(b) ABT system entitles the generating station to reimbursement of fixed cost based on the availability or declared capacity of the generating station.

(c) One of the basic objectives of the Availability Tariff for generating stations is to induce maximization of plant availability. This is done by linking the fixed cost (capacity charge) payment to the availability declaration.

(d) Recovery of fixed charge shall be on a monthly basis and shall be inclusive of any incentive and disincentive depending upon the availability achieved during the month.

36. Hence, as per the ABT Mechanism, which forms part of the APP as well as the Commission's Regulations, it is unequivocal that a fixed charge shall be paid on a monthly basis based on the Availability achieved during the month and not based on the daily Availability capped to a maximum of 85%. It is a settled position of law that a regulation framed by this Hon'ble Commission by virtue of being a delegated legislation will have an overriding effect over the provisions of the PPA. In this regard, reliance is placed upon the Hon'ble Supreme Court Judgment in **PTC India Ltd v. CERC (2010) 4 SCC 603**: -

"59. Summary of Our Findings:

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

.....

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006."

Hence, on this account also, the respondent's reliance on Article 11.3.2 of the APP to restrict payment of Capacity Charges by limiting the daily Availability up to a maximum of 85% is arbitrary and illegal.

Re: Various Judgments passed by Hon'ble APTEL and this Hon'ble Commission re payment of Fixed Charges by the Procurer

37. It is submitted that the Hon'ble APTEL, by Judgment dated 22.04.2015 passed in Appeal No. 261 of 2013 titled **Maharashtra State Electricity Distribution Co. Ltd v. CERC & Ors**" has clearly held that the Distribution Licensee is mandated to compensate the generating station with capacity charges in relation to the quantum of electricity for total declared availability made by such generating station irrespective of whether the Distribution

Licensee schedules the capacity offered by the generator or not:-

“14. We find that the Central Commission in the impugned order has given cogent and sufficient reasons to arrive at the said conclusion and the appellant has rightly been held liable to pay capacity charges even if it does not consent for a GSA/GTA to be entered between respondent No.2 power generating company and GAIL. The respondent No.2 has rightly been held entitled to the capacity charges when the respondent No.2 remains in a position to generate electricity and accordingly has declared necessary availability of electricity when the appellant had chosen not to schedule quantum of electricity on the declared availability. We further note that this aspect decided by Central Commission in the impugned order has nothing to do with the relaxation of NAPAF for the non-availability of gas decided by the Central Commission in the earlier order. Thus the appellant / distribution licensee has rightly been held under the obligation to pay the capacity charges so long as the respondent No.2 generator has declared available capacity, irrespective of whether the distribution licensee schedules the capacity offered by generator or not. Since the generator had made upfront investment in establishing operating and maintaining the generating station, the capital cost incurred needs to be serviced during the life time of the generating station through the payment of annual fixed charges because such annual fixed charges are determined with respect to specific tariff elements provided therefore, namely, tariff Regulations 2009 in the present case. Thus the Central Commission in the impugned order has rightly refused to exonerate the appellant, distribution licensee from paying the capacity / fixed charges only because the distribution licensee has refused to give consent to the power generator to enter into GSA/GTA with the gas supplier. If the appellant does not wish to take electricity based on R-LNG, the appellant is required to compensate respondent No,2 with capacity charges in relation to the quantum of electricity for total declared availability made by respondent No.2 on gas and/or R-LNG.....”

38. This Commission, by Order dated 20.01.2022 passed in Petition No. 594/MP/2020 titled ***GMR Warora Energy Limited v. DNH Power Distribution Company Limited***, has held that the Distribution Licensee is under obligation to pay tariff for all of the available capacity up to the contracted capacity and corresponding scheduled energy. Tariff is payable in two parts i.e., capacity charges and energy charges, and the capacity charge is payable on the basis of the Availability of the generating station: -

“41. From the above provisions of the PPA, we observe that the Petitioner is under obligation to keep ready the entire aggregate contracted capacity for the exclusive benefit of the Respondent and the Respondent is under corresponding obligation to pay tariff for all of the available capacity up to the contracted capacity and corresponding scheduled energy.

42. Further, the tariff is payable in two parts i.e. capacity charges and energy charges. While the former is payable on the basis of the Availability of the generating station, the latter correspond to the energy scheduled from the generating station based on the requisition of the Procurer. As rightly pointed out by

the Petitioner, the scheduling of power does not have any bearing on the capacity charges, which correspond to the availability declared by the generating companies as per ABT mechanism, the Grid Code, and provisions of the DNH PPA and not to the off-taking of power by the Procurer based on its load/ demand. Thus, in our view, the obligation of the Procurer to make the payment of Capacity Charges under the agreement does not have any linkage with the off-taking of the power by the Procurer on the basis of its varying demand.”

39. This Commission, by its Order dated 31.12.2021 passed in Petition No. 317/MP/2019 titled **Bharat Aluminium Company Limited v. Kerala State Electricity Board Limited & Anr** (**‘Balco Order dated 31.12.2021’**) while interpreting similar clauses of Balco’s PPA (which is *pari-materia* to JITPL’s APP) has categorically held that Capacity Charges payable for ‘Availability’ in each month is with reference to the normative availability achieved during each accounting year and not based on the normative Availability of each day as being contended by KSEBL in the present case. The relevant extract of Balco’s Order dated 31.12.2021 is as under: -

“19...It is settled law that the provisions of the contract have to be given full effect to and cannot be read in a narrow and pedantic manner to deny any rightful claims under the contract. While Article 21.1.1 obligates the Respondent KSEBL to pay ‘tariff’ to the Petitioner comprising of fixed charges and fuel charge for supply of power in terms of the agreement, Article 21.1.2 of the PSA obligates the Respondent KSEBL to pay an amount determined in accordance with Article 21 as ‘fixed charge’ (as part of tariff) for availability of the power station, to the extent of ‘normative availability’, which, as per Article 5.1.4 of the PSA is 90% of the contracted capacity, during each year of the operating period. Thus, on a harmonious reading of the provisions of Article 21 of the PSA and Article 5.1.4 of the PSA, it becomes evident that the fixed charges payable for ‘availability’ in each month is with reference to the normative availability (90%) achieved during each accounting year. In short, the fixed charges payable for availability in each month is to be reconciled to the extent of the normative availability achieved by the Petitioner during the year.”

40. A table detailing the comparison of the clauses of Balco’s PPA considered by this Hon’ble Commission in Balco Order dated 31.12.2021 and clauses of JITPL’s APP (including Article 11.3.2 relied upon by KSEBL) is as under: -

BALCO PPA		Pilot Scheme-2 JITPL APP	
Clause No.	Clause	Clause No.	Clause
21.4.4	The obligations of the Utility to pay Fixed Charges in any	11.3.1	The obligations of the Aggregator to pay Fixed Charges in any

BALCO PPA		Pilot Scheme-2 JITPL APP	
Clause No.	Clause	Clause No.	Clause
	Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 90% (ninety per cent computed with reference to the entitlement of the Utility in Contracted Capacity (the “Capacity Charge”). Provided, however, that in the event of a Despatch of the Power Station beyond such 90% (ninety per cent), Incentive shall be payable in accordance with the provisions of Clause 21.6.1.		Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty-five per cent) computed with reference to the Contracted Capacity (the “Capacity Charge”). Provided, however, that in the event of a Despatch of the Power Station beyond such 85% (eighty five per cent), the Incentive shall be payable in accordance with the provisions of Clause 11.5.1.
21.4.5	The Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 90% (ninety per cent) thereof and in the event it supplies electricity to the Utility in excess of Such 90% (ninety per cent), such excess supply shall be eligible only for payment of Fuel Charge, save and except the payment of Incentive due under the provisions of Clause 21.4.4.	11.3.2	The Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Aggregator in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3.1.

41. Evidently, Balco’s PPA is *pare-materia* to JITPL’s APP. Hence, the ratio enunciated by this Commission in the Balco Order dated 31.12.2021 is squarely applicable to the present case within the context of the current dispute. It is noteworthy that KSEBL is the only DISCOM which is taking the view that payment of fixed charges shall be made after restricting the generating station’s daily Availability up to a maximum of 85% even when the actual daily availability declared by the generating plant is on the higher side and which has never been disputed by the procurer.

42. In view of the above, it is unequivocal that: -

- (a) PTC/KSEBL is mandated to make payment of Capacity Charges to JITPL every month based on the cumulative Availability of the Power Plant as declared by JITPL (i.e., the sum of daily Availability declared by JITPL) to the extent of Normative

Availability i.e., 85%. That Normative Availability is to be calculated by adding various daily availability for the number of days in a month at the month's end (as per billing procedure) and NOT by restricting on a daily basis the actual daily availability to 85% or lower and then adding the same.

(b) PTC's/KSEBL's reliance on Article 11.3.2 of the APP to restrict payment of Capacity Charges by limiting JITPL's daily Availability up to a maximum of 85% is arbitrary and illegal.

(c) If JITPL is not paid full Capacity Charges corresponding to the capacity that has been declared by JITPL for PTC/KSEBL, it would go against the very basis of the Availability Based Tariff Mechanism.

(d) Provisions of the APP in so far as they are not in line with the provisions of Tariff Regulations, are not enforceable.

43. Respondent, in complete disregard to the law of the land, has restricted payment of Capacity Charge after restricting JITPL's daily Availability/DC up to a maximum of 85%. A table detailing JITPL's Daily and Cumulative Availability/DC for the month of January 2022 as declared by JITPL and as considered by PTC/KSEBL for payment of Capacity Charges is as under:-

Date	Daily Availability as declared by JITPL in line with Clause No. 11.4	Cumulative Availability of JITPL in line with Clause No. 11.3.1 & 11.3.2 for the Month	Availability to be paid for by PTC/ KSEB as per Clause no. 11.3.1 & 11.3.2	Availability being paid for by PTC/KSEBL in line with clause no. 11.3.2	Cumulative Availability of JITPL as per PTC/ KSEBL in line with Clause No. 11.3.2 for the Month	Scheduled Generation (SG) as availed by PTC/KSEBL
01.01.2022	6.480000	6.480000	6.480000	5.508000	5.508000	6.4800
02.01.2022	6.480000	12.960000	6.480000	5.508000	11.016000	6.4800
03.01.2022	5.597640	18.557640	5.597640	4.757994	15.773994	5.5976
04.01.2022	1.765375	20.323015	1.765375	1.765375	17.539369	1.7654
05.01.2022	0.000000	20.323015	0.000000	0.000000	17.539369	0.0000
06.01.2022	0.000000	20.323015	0.000000	0.000000	17.539369	0.0000
07.01.2022	1.559908	21.882923	1.559908	1.329345	18.868714	1.3293
08.01.2022	6.012828	27.895750	6.012828	5.508000	24.376714	6.0128
09.01.2022	6.480000	34.375750	6.480000	5.508000	29.884714	6.4800
10.01.2022	6.480000	40.855750	6.480000	5.508000	35.392714	6.4800
11.01.2022	6.480000	47.335750	6.480000	5.508000	40.900714	6.4800
12.01.2022	6.480000	53.815750	6.480000	5.508000	46.408714	6.4800
13.01.2022	6.480000	60.295750	6.480000	5.508000	51.916714	6.4800
14.01.2022	6.480000	66.775750	6.480000	5.508000	57.424714	6.4800
15.01.2022	6.480000	73.255750	6.480000	5.508000	62.932714	6.4800
16.01.2022	3.944415	77.200165	3.944415	3.944415	66.877129	3.9444

17.01.2022	3.389520	80.589685	3.389520	3.389520	70.266649	3.3895
18.01.2022	4.562625	85.152310	4.562625	4.562625	74.829274	4.5626
19.01.2022	6.480000	91.632310	6.480000	5.508000	80.337274	6.4800
20.01.2022	6.480000	98.112310	6.480000	5.508000	85.845274	6.4800
21.01.2022	6.480000	104.592310	6.480000	5.508000	91.353274	6.4800
22.01.2022	6.480000	111.072310	6.480000	5.508000	96.861274	6.4800
23.01.2022	6.480000	117.552310	6.480000	5.508000	102.369274	6.4800
24.01.2022	6.480000	124.032310	6.480000	5.508000	107.877274	6.4800
25.01.2022	6.480000	130.512310	6.480000	5.508000	113.385274	6.4800
26.01.2022	6.480000	136.992310	6.480000	5.508000	118.893274	6.4800
27.01.2022	6.480000	143.472310	6.480000	5.508000	124.401274	6.4800
28.01.2022	6.480000	149.952310	6.480000	5.508000	129.909274	6.4800
29.01.2022	4.150725	154.103035	4.150725	4.150725	134.059999	4.1507
30.01.2022	3.613200	157.716235	3.613200	3.613200	137.673199	3.6132
31.01.2022	3.024000	160.740235	3.024000	3.024000	140.697199	3.0240
Total	160.740235		160.740235	140.697199		160.5097
Percentage Availability for the month	80.02%		80.02%	70.53%		

* All figures in MUs.

44. In terms of the above table, the following are noteworthy: -

(a) If the power scheduled/procured by PTC/KSEBL in the month of January 2022 is ~160.51 MUs, then there is no occasion for PTC/KSEBL to contend that the DC/Availability of JITPL's power plant will be considered as ~140.69 MUs, i.e., lower than the Scheduled Generation. This is fundamentally incorrect since scheduled/actual generation can either be equal to OR lower than the DC.

(b) Effectively, PTC/KSEBL, while acknowledging that JITPL has generated ~160.51 MUs in January 2022, which has been procured by PTC/KSEBL – however, while making payments for such power PTC/KSEBL has only considered the Availability as ~140.69 MUs.

45. Evidently, for the month of January 2022, JITPL for its Power Plant has declared a Cumulative Availability of 80.02% (which is less than the Normative Availability of 85%). However, PTC/KSEBL, while making payment of Capacity Charges for January 2022, has arbitrarily restricted JITPL's Availability to 70.53% based on an erroneous interpretation of Article 11.3.2 of the APP & paid only 70.53%. Further KSEB/PTC had enjoyed the generation to the extent of 80.02%. As elaborated above, if availability for payment is on the lower side, i.e. 140.69 MUs, how can scheduled generation be higher at 160.51 MUs? Such actions of PTC/KSEBL, apart from being violative of the APP (as demonstrated above), are also violative of the principles enshrined under Section 61 of the Electricity Act in terms of

which 'recovery of cost of electricity' has to be allowed and 'generation and supply of electricity are to be conducted on commercial principles' with a view to promoting private sector participation in the electricity sector, competition, efficiency and economical use of resources.

B. KSEBL HAS ADMITTED THAT FIXED CHARGES PAYABLE FOR A MONTH ARE TO BE COMPUTED BASED ON MONTHLY AVAILABILITY

46. It is submitted that KSEBL itself, in the proceedings of Petition No. 317/MP/2019 (i.e., Balco's Case) before this Commission, has admitted that Capacity Charges payable for a month are to be computed based on 'monthly' availability and not based on daily Availability. KSEBL's admission is recorded at Para 16 of the Balco Order dated 31.12.2021 passed by this Hon'ble Commission: -

*"16. Per contra, the Respondent KSEBL has submitted that as per provisions of the PSA (Articles 21.4, 21.5 and 21.6), the fixed charges for a month are computed based on 'monthly' availability and the supplier (Petitioner herein) shall not be eligible to receive payment of fixed charges for availability, exceeding normative availability of 90%. The Respondent has also pointed out that 'incentive' is computed, if the monthly availability exceeds 'normative availability' and damages are levied if the monthly availability falls below 85%. It has further submitted that Article 21.6.3 of the PSA is clear and unambiguous in stipulating that the yearly reconciliation of availability with reference to normative availability for an accounting year is determined only for computation of 'incentives' and 'damages' and not for 'fixed charges', under the DBFOO framework laid down by MOP, GOI. **The Respondent has contended that fixed charges are to be paid for availability in each month of the relevant accounting year and there is no provision in the PSA for computation of annual availability and reconciliation of fixed charges with respect to annual availability. Accordingly, Respondent KSEBL has submitted that the relief sought by the Petitioner may be rejected.**"*

47. It is a settled position of law that facts admitted need not be proved and is by far the best proof of the facts admitted. Admissions in communications or judicial proceedings made by the parties are fully binding on the party that makes them and constitute a waiver of proof. In this regard, reliance is placed on the following judgment of the Hon'ble Supreme Court:-

(a) **Nagindas Ramdas vs. Dalpatram Ichharam, (1974) 1 SCC 242:-**

"27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so

satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself, Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under s.58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties On the other hand evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

(b) **Gautam Sarup vs. Leela Jetly, (2008) 7 SCC 85:-**

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

48. In view of the aforesaid position of law, it is submitted that KSEBL. after judicially admitting the position that Capacity Charges payable for a month are to be computed based on 'monthly' availability is bound by the same and cannot take different stands in different proceedings. The Hon'ble APTEL, by its Judgment dated 12.08.2021 passed in Appeal No. 421 of 2018 titled **Adani Power (Mundra) Limited v. CERC & Ors**, has held that Distribution Licensees being a public utility, cannot adopt a different approach/yardstick for different parties but should have the same approach towards all the parties: -

"50. Though Respondents contend that the payment of interest by Haryana utilities in the said petition cannot be a ground for claiming computation of interest on carrying cost, but there is no explanation as to why Respondent utilities are taking different yardstick for different parties. The Respondent being a public utility, cannot adopt a different approach but should have same approach towards all the parties. In the absence of any explanation as to why the facts in the present appeal are different from the facts in Petition No.235/MP/2015, we are of the opinion that the Appellants are entitled for interest on carrying cost as well."

49. It is submitted that KSEBL qualify as a State under Article 12 of the Constitution of

India. The Hon'ble Supreme Court in ***Shrilekha Vidyarthi (Kumari) v. State of Uttar Pradesh, (1991) 1 SCC 212*** [Para 21, 23-24] has held that when a State enters into contractual relations with a private party, the action of the State or its instrumentality must continue to be guided by principles of fairness, reasonableness and founded in law. The action of the State must satisfy the test of reasonableness as provided under Article 14 of the Constitution. If the action of the State is arbitrary and, therefore, violative of Article 14, there can be no impediment in striking down the impugned act, irrespective of the question of whether an additional right, contractual or statutory, is also available to the aggrieved persons.

50. In the present case with the view to denying JITPL's legitimate dues, PTC/KSEBL has taken a volte-face from judicially admitted position and deducted Rs. 3,76,87,289/- & Rs. 3,20,33,447/- from the Monthly Invoice dated 03.02.2022 & 01.03.2022 respectively by arbitrarily restricting JITPL's daily Availability up to maximum of 85%. There is an inherent contradiction, if not falsity, in KSEBL's stand. The Hon'ble Supreme Court in ***Suzuki Parasrampuriah Suitings (P) Ltd v. Official Liquidator, (2018) 10 SCC 707*** has held that taking an inconsistent stand by a party makes its conduct far from satisfactory. Hence, such action of KSEBL is per-se illegal, arbitrary, abuse of its dominant position and unbecoming of a state instrumentality.

RESPONDENTS ARE NOT ENTITLED TO AVAIL OF REBATE/DISCOUNT

51. It is submitted that for the power supplied during the month of January 2022, JITPL had raised an Invoice on 03.02.2022 claiming a tariff payment of Rs. 52,75,59,650/- from PTC. However, PTC, on 09.02.2022, made a payment of Rs. 48,93,44,801/- only against JITPL's claim of Rs. 52,75,59,650/-. Further, PTC/KSEBL has illegally availed of a rebate of 1%, totalling Rs. 49,48,206/- on the Invoice amount without making full payment of the Invoice. Similarly, Rs. 3,20,33,447/- has been deducted from the February 2022 bill, and a rebate has been availed of (*rebate details are awaited*). It is submitted that the Hon'ble Supreme Court in ***T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd, (2014) 11 SCC 53*** ("PPN Judgment") has held that rebate/discount cannot be claimed by the Distribution Licensee if there is failure to make complete and full payment of the amount under the Monthly Bills. A rebate will not be applicable if part payment is made: -

"71. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part-payment of the monthly invoices within 5 business days. We have noticed earlier that it was a precondition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, APTEL has come to the conclusion that merely

because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by APTEL. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Articles 10.3(a) to (c) of the PPA, letter of credit is to be established covering three months estimated billing, one month prior to commercial operation date. Under Article 10.3(d) of the PPA, an escrow account is to be established by the appellant in favour of the power company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2(e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of APTEL on this issue do not call for any interference.

72. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for compensation payment and billing. We are also not able to accept the submission of Mr Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part-payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September

each year. Therefore, the benefit of interest has been given on such annual invoices.”

52. In view of the aforesaid position of law, it is submitted that PTC is not entitled to avail of the rebate of 1% totalling Rs. 49,48,206/- on the admitted amount since PTC/KSEBL has failed to make complete and full payment of the Monthly Invoice dated 03.02.2022 raised by JITPL. Hence, PTC/KSEBL ought to be directed to refund the same along with applicable interest on such delayed payment.

53. It is further submitted that the Hon'ble Supreme Court in **PPN Judgment** has held that: -

(a) Unilateral deductions from monthly bills by a party without adjudication are illegal [Para 72].

(b) Payment of Tariff Invoices has to be made in full when due, even if the entire portion or a portion of the invoice is disputed [Para 71].

54. Hence, such unilateral deductions made by PTC/KSEBL without raising any dispute over the Monthly Invoice dated 03.02.2022 are per-se illegal, arbitrary, and in direct violation of the Hon'ble Supreme Court's PPN Judgment.

IA no. 16/2022 filed by the Petitioner:

55. The Petitioner, vide its affidavit dated 11.3.2022, while reiterating its submissions made in the main petition, has prayed as under:

a) Direct PTC/KSEBL to make full payment of Monthly Invoice dated 03.02.2022 and 01.03.2022 based on the monthly cumulative Availability declared by JITPL for the said months along with applicable interest on deducted amounts; and

(b) Direct PTC/KSEBL to make full and complete payment of the Capacity Charges to be claimed by JITPL under the future Monthly Invoices based on the monthly cumulative Availability declared by JITPL for such months (i.e., the sum of daily Availability declared by JITPL);

(c) Restrain PTC/KSEBL from taking any coercive actions against JITPL and from making any deductions from the Monthly Invoices to be raised by JITPL on this account for the power supplied under APP dated 25.10.2021

IA no. 44/2022 filed by the Respondent no.2:

56. **The Respondent no.2 has made the following prayers in the IA filed**

It is most respectfully prayed that this Hon'ble Commission be pleased to: -

- (a) Vacate the interim directions issued vide order dated 14.06.2022 passed by the Hon'ble Commission to the extent it directs the Applicant not to make any further deduction from the monthly invoices raised by the Petitioner on the ground which is the subject matter of the present case;
- (b) Direct that the Registry of the Hon'ble Commission shall not permit listing of any case wherein the Petitioner has not mapped the Respondents on the e-filing portal of the Hon'ble Commission;
- (c) Pass such other and further orders as this Hon'ble Commission shall deem fit and proper in the facts and circumstances of the present case.

Reply of Respondent No.2 (KSEBL):

57. It is most respectfully submitted that as per the Power Supply Agreement (PSA) under Pilot Scheme-II entered between KSEBL and M/s. PTC India Limited on 27.10.2021, the Aggregator M/s. PTC India Limited is to supply 270 MW RTC power to KSEBL from the supplier M/s. Jindal India Thermal Power Limited (JITPL), on a Medium Term Basis from January to June for 3 years from 01-01-2022 onwards.

58. As per clause 3 of Supplementary Agreement to the PSA between the Aggregator and Utility and Supplementary Agreement to the PPA between Aggregator and Supplier, *"..... Aggregator/Supplier shall apply for STOA on behalf of KSEBL for the mutually agreed period and utilise advanced STOA, FCFS STOA, upto Day Ahead STOA available for applying for short term open access within the stipulated timelines as per the prevailing regulations until the same is granted for the entire contracted quantum....."*, Thus, as mutually agreed by Aggregator / Supplier and Buyer (Utility), the drawal of power is through Short Term Open Access and as per the above provision of the Agreement, the STOA application is to be made the Aggregator / Supplier.

59. The power flow to KSEBL started from 01.01.2022 onwards.

60. Provisions related to the tariff in the Power Supply Agreement executed on 27-10-2021 between PTC and KSEBL for the supply of 270MW power from JITPL station are extracted hereinbelow:-

"..... 11.1 Tariff

11.1.1 *The Utility shall pay to the Aggregator tariff comprising the sum of Fixed Charge and Variable Charge payable by the Utility to the Aggregator for Availability and for supply of electricity, as the case may be, in accordance with the provisions of this Agreement (the "Tariff").*

11.1.2 *As a part of the Tariff, the Aggregator shall pay to the Supplier an amount, determined in accordance with the provisions of this Article 11, as the Fixed*

Charge for Availability of the Power Station to the extent of Normative Availability thereof (the “**Fixed Charge**”).

11.1.3 In addition to the Tariff, the Utility shall pay to the Aggregator a trading margin of Rs. 0.0173/ kWh (the “**Trading Margin**”).

11.2 Fixed Charge

The Parties agree that the Fixed Charge payable for Availability shall, in accordance with the offer of the Supplier, be Rs. 1.63 (Rupees One Point Six Three) per kWh, which shall remain constant for the entire contract period.

11.3 Computation of Fixed Charge

11.3.1 The obligations of the Utility to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty five per cent) computed with reference to the Contracted Capacity (the “**Capacity Charge**”). Provided, however, that in the event of Despatch of the Power Station beyond such 85% (eighty five per cent), Incentive shall be payable in accordance with the provisions of Clause 11.5.1.

11.3.2 **The Aggregator shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Utility in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3.1.**

11.3.3 In the event that any shortfall in supply of electricity to the Utility occurs on account of deficiency in transmission between the Point of Grid Connection and Drawal Point, Availability shall be deemed to be reduced in accordance with the provisions of Clause 11.4.2 and the Utility shall not be liable for payment of any Fixed Charge for the Non-Availability arising as a consequence thereof.”

61. Similar provisions also exist in the Agreement for Procurement of Power under Pilot Scheme-II and Supplementary Agreement (signed between PTC India Ltd. and JITPL on 25-10-2021) which are extracted hereinbelow for ready reference: -

“.....

11.1. Tariff

11.1.1 The aggregator shall pay to the supplier tariff comprising the sum of fixed and variable charge payable by the aggregator to the supplier for availability and for supply of electricity, as a case may be in accordance with the provisions of this agreement.

11.1.2. As a part of the tariff aggregator shall pay to the supplier and amount, determined in accordance with the provisions of this Article 11, as the fixed charge for availability of the power station to the extent of normative availability thereof (the “**Fixed charge**”).

11.2 Fixed Charge

The parties agree that the Fixed charge payable for availability shall, in accordance with the offer of the supplier, be Rs.1.63(Rupees One point six three) per kWh which shall remain constant for the entire contract period.

11.3 Computation of Fixed Charge

11.3.1 The obligations of the Aggregator to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty five per cent) computed with reference to the Contracted Capacity (the "**Capacity Charge**"). Provided, however, that in the event of Despatch of the Power Station beyond such 85% (eighty five per cent), Incentive shall be payable in accordance with the provisions of Clause 11.5.1.

11.3.2 **The Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Aggregator in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3.1.**

11.3.3 In the event that any shortfall in supply of electricity to the Aggregator occurs on account of deficiency in transmission between the Point of Grid Connection and Drawal Point, Availability shall be deemed to be reduced in accordance with the provisions of Clause 11.4.2 and the Aggregator shall not be liable for payment of any Fixed Charge for the Non-Availability arising as a consequence thereof."

62. Collective reading of the provisions of the APP and the PSA clearly demonstrate *inter alia* that: -

- (d) The Utility shall pay to the Aggregator tariff comprising the sum of Fixed Charge payable by the Utility to the Aggregator for Availability to the extent of Normative Availability and Variable Charge for supply of electricity.
- (e) As a part of the Tariff, the Aggregator shall pay to the Supplier an amount determined in accordance with the provisions of Article 11 as the Fixed Charge for the Availability of the Power Station to the extent of Normative Availability thereof.
- (f) In addition to the Tariff, the Utility shall pay to the Aggregator a trading margin of Rs. 0.0173/ kWh.
- (g) The Fixed Charge payable for Availability shall, in accordance with the offer of the Supplier, be Rs. 1.63 (Rupees One Point Six Three) per kWh, which shall remain constant for the entire contract period.

- (h) **The Aggregator shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty-five percent) thereof, and in the event, it supplies electricity to the Utility in excess of such 85% (eighty-five percent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of PSA.**
- (i) In the event of a Despatch of the Power Station beyond such 85% (eighty-five per cent) in any Accounting Year, Incentive shall be payable in addition to variable charges.

63. It is submitted that the computation of Fixed Charges payable for a month is to be carried out based on the above provisions in the PSA.

64. The provisions in the PSA clearly state that the Aggregator **shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Utility in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of PSA.**

65. Aforesaid provision makes it abundantly clear that the payment of Fixed Charges is to be made in relation to the Availability while capping the Availability on a daily basis at 85%, the Normative Availability, and for any excess over and above 85% Normative Availability, the excess supply shall be eligible only for payment of Variable Charge and/or Incentive [if applicable].

66. Entirely in conformity with the above provision in the PSA, the Fixed Charges admissible for PTC India Ltd. have been determined by computing the Fixed Charges payable in respect of every day to be on the basis of actual Availability or 85% (Normative Availability), whichever is lower. Payments made on such basis are entirely in conformity with the provisions of the APP as well as the PSA, as mentioned hereinabove.

67. The provision of Clause 11.3.2 is clear and unambiguous and does not permit payment of any Fixed Charges for any day for more than 85% of the Normative Availability. The Petitioner is seeking to place a misconceived and impermissible interpretation on the provisions of the Agreement to seek to contend that the cumulative monthly Availability is to be computed for payment of Fixed Charges, such interpretation being in complete contravention of the clear and unambiguous provision of Clause 11.3.2.

68. the relief sought by the Petitioner, in effect, is a prayer to seek a unilateral amendment of the contract between the parties and effectively seeking deletion of Clause

11.3.2 of the Agreement [for obtaining impermissible benefits for itself], which is impermissible in law and would deserve to be rejected by this Hon'ble Commission at the threshold itself.

69. The contention of the Petitioner to effect as if the answering Respondent is seeking to re-work the Availability of its generating station – is entirely misconceived and misleading. It is respectfully submitted that the answering Respondent has, in the present facts, neither contested nor reworked the declared Availability of the Petitioner, however, for computing the fixed charges payable, KSEBL has strictly followed the provisions of the PSA and limited the Fixed Charges to 85% Availability on a daily basis and for Availability exceeding 85%, Incentive corresponding to 50% Fixed Charges has been allowed, as envisaged under the Agreement. This is the mechanism provided under clause 11.3.2 of the PSA.

70. In Article 1 of the PSA, under the “Definitions and Interpretation” cause, it is clearly provided in clause (j) as under:-

“any reference to day shall mean a reference to a calendar day”

71. Further, as per clause 1.4.2, in case of ambiguities or discrepancies within the Agreement, the following principle shall apply: -

“Between two or more clauses of this Agreement, the provisions of a specific clause relevant to the issue under consideration shall prevail over those in other clauses”.

72. The above-mentioned clauses, read with the provision of Clause 11.3.2 of the Agreement, leave no scope for any doubt or ambiguity that the payment of Fixed Charges for any quantum more than 85% Normative Availability on any day – is **prohibited** under the provisions of the Agreement, and there is no permissibility for the Petitioner to claim any such payment, in complete contravention of the terms of the Agreement.

73. Reliance placed by the Petitioner on other provisions of the Agreement, including Clauses 5.1.4, 11.1.1, 11.1.2, 11.2, 11.3.1 and 11.5.3 is entirely misplaced and misconceived. It is respectfully submitted that the aforesaid Clauses deal with other aspects under the entire framework of the Agreement, however, none of the said Clauses suggest the interpretation sought to be claimed by the Petitioner, which interpretation is directly contrary / opposed to the clear and unambiguous wording of Clause 11.3.2 of the Agreement. It is respectfully submitted that there would be no permissibility for the Petitioner to claim any relief by relying on selective portions of the Agreement, devoid of context, which would be contrary to the provision directly dealing with the issue in question i.e. Clause 11.3.2. Any such contention of the Petitioner would also deserve to be rejected, *inter alia*, in view of the mandate of Clause 1.4.2 of the Agreement. It is prayed accordingly.

Issue of Rebate

74. In terms of Article 11.10 of the PSA, in the event the Utility pays the Tariff within 5 (five) days of the date of submission of the invoice thereof, it shall be entitled to deduct 1% (one per cent) of the amount comprising the Tariff by way of discount for early payment.

75. The relevant article is extracted hereinbelow for ready reference of this Hon'ble Commission:-

"11.10 Discount for early payment

The Parties expressly agree that in the event the Utility pays the Tariff within 5 (five) days of the date of submission of the invoice thereof, it shall be entitled to deduct 1% (one per cent) of the amount comprising the Tariff by way of discount for early payment."

76. In the facts of the present case, the monthly invoices paid by KSEBL are within the stipulated date as per the PSA, and therefore, KSEBL is entitled to claim a rebate on the payment made. It is submitted that KSEBL has rightly claimed a rebate only for the amount paid by KSEBL and not for the entire invoice amount [wherein the Petitioner had also raised certain inadmissible claims which have been correctly rejected by KSEBL].

77. Without prejudice to the above, it is submitted that even in the case of any bonafide dispute, there provision of Clause 11.10 would squarely apply in relation to the timely payment of the undisputed amount by the answering Respondent.

Reply of Respondent No.1 – PTC India Ltd. to The Petition

78. Respondent No.1 (PTCIL, vide its reply dated 3.6.2022 has mainly submitted as under:

a) Answering Respondent had deducted the amount only when similar amounts were deducted by Respondent No.2, i.e. Kerala State Electricity Board Ltd.

b) The crux of the matter in the present petition is the applicability and interpretation of Article 11.3.2 of the Power Supply Agreement under Pilot Scheme II dated 27.10.2021, and the Agreement for Procurement of Power under Pilot Scheme II dated 25.10.2021 which are on back to back basis.

c) Further, the whole transaction being on a back-to-back basis, the Answering Respondent, being a 'Trader', has acted as a conduit/facilitator.

d) The issue in the present petition is whether, under Article 11.3.2, the calculation for payment of Fixed Charges is to be done on a monthly basis or daily basis. It is submitted that the answering Respondent does not agree with the interpretation of Article 11.3.2 by Respondent No.2.

e) With respect to the rebate of 1%, it is submitted that the answering Respondent/PTC had availed of the rebate of 1% on the amount released. It is a well-settled principle that a rebate is availed of on the amount released. Further, as already stated the amount deducted is on the basis of a similar deduction made by Respondent No.2. It is also pertinent to mention that Respondent No. 2 has also availed the rebate of 1% on the amount released by them.

f) As the subject matter is before this Commission, the answering Respondent shall abide by the decision of this Commission, and in case the payment which has been deducted by the Respondent No.2 is released, the same shall be released by the answering Respondent to the Petitioner.

Rejoinder of the Petitioner to the reply of Respondent-2-KSEBCL:

79. In its rejoinder to the reply of Respondent no.2, KSEBCL, the Petitioner has mainly submitted as under:

a) that KSEBL, in its reply, has merely denied JITPL's claim that Capacity Charges have to be paid by PTC/KSEBL each month based on the cumulative Availability declared by JITPL for such month to the extent of Normative Availability. While dealing with JITPL's contention regarding payment of Capacity Chares, KSEBL has solely relied on Article 11.3.2 of the APP while completely ignoring the existence and applicability of other relevant provisions of the APP i.e., Articles 5.1.4, 11.1.1, 11.1.2, 11.3.1 and 11.5.3 which establishes the case of JITPL.

b) KSEBL, in its reply, has merely denied the other contentions of the Petitioner by: -

i) Baldly contending that Balco Order, GMR Order, Hon'ble APTEL Judgment, CERC Tariff Regulations and the ABT Mechanism are not applicable in the present case; and

ii) The case laws referred to by JITPL (i.e., the GMR Order, Balco Order and APTEL judgment) have been rendered in the context of peculiar facts and circumstances of the said cases and do not have any applicability in the facts of the present case.

c) Such evasive denial by KSEBL further established the case of JITPL, especially when, in the case of GMR Order and Balco Order, this Commission has specifically laid down the mechanism for computation and payment of fixed charges to the generating company under Section 63 PPAs i.e., based on the actual availability declared by the generating company, which is line with the claim of the Petitioner. Further, KSEBL, in its reply, has also not dealt with its admission as recorded in the Balco Order, which establishes the case of the Petitioner.

d) Thus, KSEBL has failed to respond to the case laws and KSEBL's admission referred to by JITPL in its Petition to establish its claim qua computation and payment of fixed charges. It is a settled principle of law that a written statement/ reply must deal specifically with each allegation of fact in the plaint, and when a defendant denies any such fact, he must not do so evasively and answer the points of substance.

80. Further, the Petitioner has reiterated its submissions made in the petition by quoting various provisions of APP in support of its prayers, which are not being recorded again for brevity.

KSEBL is not entitled to avail Rebate on payment of monthly invoices

81. Further, with regard to the rebate availed of by Responder-2 stating that it has made timely payment of the monthly invoices raised by JITPL and hence in terms of Article 11.10 of the APP/PSA, it is entitled to avail of rebate on the payments made, the Petitioner submitted that the aforesaid contention of KSEBL is wrong and has denied the same. KSEBL, without making complete/full payment of the monthly invoices for January, February, April and May 2022, has illegally and forcibly availed a rebate of 1% from the said invoices. In this regard, the Petitioner has submitted law cases in support of its contention that a rebate is allowable only if the billed amount is paid fully and timely.

Analysis and Decision:

82. Based on the rival submissions of the Petitioner and the Respondents, the major issues which evolve for the consideration of the Commission are as under:

- a) **Whether the action of Respondent no 2 in limiting the payment of fixed charges to normative availability, i.e. 85% of the contracted capacity on a daily basis, is in contravention to provisions of APP /PSA .**
- b) **Whether the action of Respondent no 2 in availing the rebate without paying the full amount as was billed by the Petitioner is as per the provisions of APP/PSA.**

83. Respondent, with regard to the first issue of limiting the payment of fixed charges, has submitted that in view of the explicit provision of Article 11.3.2 related to payment of fixed charges limited to normative availability i.e. 85% on a daily basis, the reliance made by the Petitioner on Articles 5.1.4, 11.1.1, 11.1.2, 11.3.1,11.5.2 and 11.5.3 of APP is misplaced. Per Contra, the Petitioner has submitted that the Respondent has solely relied on Article 11.3.2 of the APP while completely ignoring the existence and applicability of other relevant provisions of the APP i.e., Articles 5.1.4, 11.1.1, 11.1.2, 11.3.1,11.5.2 and 11.5.3.

84. In this regard, the relevant provisions of the APP, as referred to by the Petitioner and the Respondents, are as under:

i) 5.1.4 of APP:

*5.1.4 The Supplier shall operate and maintain the Power Station in accordance with the Specifications and Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the "**Normative Availability**").*

Explanation:

*Availability of the Power Station to its full capacity shall, in respect of any hour, mean the capacity of the Power Station to the extent it is offered by the Supplier for producing and supplying electrical energy equal to 1000 kWh per mega watt of Contracted Capacity over a period of one hour, after accounting for auxiliary consumption, and transmission losses upto the Point of Grid Connection, and for any month or year, as the case may be, the hours during that month or year when the Contracted Capacity of the Power Station is fully available for production of electricity shall be expressed as a percentage of total hours in that month or year, as the case may be, (the "**Availability**"). For the avoidance of doubt, the Parties agree that Availability shall, during the months when Appointed Date or the date of Termination occurs, be determined with reference to the number of days when the Power Station was in operation, and shall be determined likewise for any single day of operation. The Parties further agree that if the Contracted Capacity of the Power Station is not Available for production of electricity to its full capacity during any hour, or part thereof, not being less than a quarter of an hour, such hour or part thereof shall, in the computation of Availability, be reduced proportionate to the Non-Availability during that hour. The Parties also agree that the determination of Availability hereunder shall be solely for the purposes of this Agreement and shall not in any manner affect the rights and obligations of the Supplier for and in respect of scheduling and despatch of electricity under Applicable Laws and the rules and regulations thereunder.*

The Supplier shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:

- (a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars as may be required for obtaining Applicable Permits, and obtain and keep in force and effect such Applicable Permits in conformity with Applicable Laws; Non-grant of medium term open access shall be mutually decided by the Aggregator and Supplier;*
- (b) procure, or cause to be procured, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes, know-how and systems used or incorporated into the Power Station;*
- (c) perform and fulfil its obligations in respect of debt service for the Power Station;*
- (d) make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or its Contractors in connection with the performance of its obligations under this Agreement;*
- (e) ensure and procure that its Contractors comply with all Applicable Permits and Applicable Laws in the performance by them of any of the Supplier's obligations under this Agreement;*
- (f) . always act in a manner consistent with the provisions of this Agreement and not cause or fail to do any act, deed or thing, whether intentionally or otherwise, which may in any manner be violative of any of the provisions of this Agreement or Applicable Laws;*
- (g) procure that all equipment and facilities comprising the Power Station are operated and maintained in accordance with Good Industry Practice;*
- (h) support, cooperate with and facilitate the Aggregator in the implementation of this Agreement;*
- (i) comply with the provisions of Applicable Laws with regard to metering of supply of electricity;*
- (j) comply with the directions of the Commission issued from time to time under the Act;*
- (k) perform and fulfil its obligations under the Fuel Supply Agreement*

ii) Article 11 of APP:

11.1 Tariff

11.1.1 *The Aggregator shall pay to the Supplier tariff comprising the sum of Fixed Charge and Variable Charge payable by the Aggregator to the Supplier for Availability and for supply of electricity, as the case may be, in accordance with the provisions of this Agreement (the "Tariff").*

11.1.2 *As a part of the Tariff, the Aggregator shall pay to the Supplier an amount, determined in accordance with the provisions of this Article 11, as the Fixed Charge for Availability of the Power Station to the extent of Normative Availability thereof (the "Fixed Charge").*

11.2 Fixed Charge

The Parties agree that the Fixed Charge payable for Availability shall, in accordance with the offer of the Supplier, be Rs. 1.63 (Rupees One Point Six Three) per kWh, which shall remain constant for the entire contract period.

11.3 Computation of Fixed Charge

- 11.3.1 *The obligations of the Aggregator to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 85% (eighty five per cent) computed with reference to the Contracted Capacity (the "Capacity Charge"). Provided, however, that in the event of Despatch of the Power Station beyond such 85% (eighty five per cent), Incentive shall be payable in accordance with the provisions of Clause 11.5 .1.*
- 11.3.2 *The Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Aggregator in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3 .1.*
- 11.3.3 *In the event that any shortfall in supply of electricity to the Aggregator occurs on account of deficiency in transmission between the Point of Grid Connection and Drawal Point, Availability shall be deemed to be reduced in accordance with the provisions of Clause 11.4.2 and the Aggregator shall not be liable for payment of any Fixed Charge for the Non-Availability arising as a consequence thereof.*

11.4 Declaration of Availability

- 11.4.1 *Unless otherwise notified by the Supplier, the declared Availability shall, be deemed to be 100% (one hundred per cent) thereof at all times.*
- 11.4.2 *In the event that any shortfall in supply of electricity to the Aggregator occurs on account of any deficiency in transmission access, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Supplier to the Aggregator forthwith.*
- 11.4.3 *The Supplier shall notify, no later than 15 (fifteen) days prior to the commencement of a month, its maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Supplier shall, as soon as may be, notify any modifications of its maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (fortyeight) hours prior to its occurrence.*
- 11.4.4 *In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "Misdeclaration") shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Fixed Charge, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on*

account of Mis-declaration shall be made from the subsequent payments due to the Supplier under this Agreement.

11.4.5 Notwithstanding the provisions of Clause 11.4.4, any reduction in Availability arising out of de-commissioning due to Emergency or a Force Majeure Event shall not be deemed to be Mis-declaration if the Supplier shall have notified the Aggregator in accordance with the provisions of Clauses 16.5.

11.5 Incentive and Damages

11.5.1 In the event that the Availability in any month exceeds the Normative Availability, the Supplier shall, in lieu of a Fixed Charge, be entitled to an Incentive which shall be calculated and paid at the rate of 50% (fifty per cent) of the Fixed Charge for Availability in excess of Normative Availability. Provided, however, that any Incentive hereunder shall be due and payable only to the extent of Despatch of the Power Station. For the avoidance of doubt and by way of illustration, in the event the Availability in any month shall exceed the Normative Availability by 3% (three per cent) of the Contracted Capacity but the Despatch during that month shall exceed 1% (one per cent) of the Contracted Capacity, the Incentive payable hereunder shall be restricted to such 1% (one per cent) only.

11.5.2 In the event that Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability and in addition, any reduction below the Normative Availability shall be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability, For the avoidance of doubt, the Parties agree that the Damages to be deducted for any reduction in Normative Availability shall be 25% (twenty five per cent) of the Fixed Charge which is reduced on account of shortfall in Availability below Normative availability.

However, it is clarified that no Damages shall be payable for reduction in Availability on account of deficiency in transmission access.

11.5.3 The Parties expressly agree that within 30 (thirty) days of the close of every Accounting Year, the cumulative monthly Availability for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year. The amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.

85. The reading of Article **5.1.4** brings out that the Supplier shall operate and maintain the Power Station in accordance with the Specifications & Standards and the Maintenance Requirements such that the Availability of the Contracted Capacity of the Power Station is at least 85% (eighty five per cent) thereof during each year of the Contract Period (the **"Normative Availability"**)

86. As such, the generating station with a contracted capacity of 270 MW has the obligation to be available for the beneficiaries so as to supply a minimum of 2010.42 MUs (270x365x24x0.85/1000) to Respondent No.2 during a year of 365 days, where 0.85 is the

factor for normative availability agreed upon in the APP. Thus, by definition of Normative availability, this minimum obligation of 2010.42 MUs is on a yearly basis and does not in any way suggest that the generating station should be available to generate the energy of 5.508 MUs (2010.42/365) on a daily basis.

87. Now, coming to article 11.3.2 relied on Respondent no.2 for making deductions in bills raised by the Petitioner, the same is again quoted as under for ready reference:

“The Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof, and in the event it supplies electricity to the Aggregator in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of Clause 11.3 .1”.

88. Based on the submissions of the Petitioner and the Respondents, we are considering the table as under submitted by the Petitioner to understand the issue at hand:

Date	Daily Availability as declared by JITPL in line with Clause No. 11.4	Cumulative Availability of JITPL in line with Clause No. 11.3.1 & 11.3.2 for the Month	Availability being considered for payment of fixed charge by PTC/KSEBL in line with clause no. 11.3.2	Cumulative Availability of JITPL as per PTC/ KSEBL in line with Clause No. 11.3.2 for the Month	Scheduled Generation (SG) as availed by PTC/KSEBL
01.01.2022	6.480000	6.480000	5.508000	5.508000	6.4800
02.01.2022	6.480000	12.960000	5.508000	11.016000	6.4800
03.01.2022	5.597640	18.557640	4.757994*	15.773994	5.5976
04.01.2022	1.765375	20.323015	1.765375	17.539369	1.7654
05.01.2022	0.000000	20.323015	0.000000	17.539369	0.0000
06.01.2022	0.000000	20.323015	0.000000	17.539369	0.0000
07.01.2022	1.559908	21.882923	1.329345**	18.868714	1.3293
08.01.2022	6.012828	27.895750	5.508000	24.376714	6.0128
09.01.2022	6.480000	34.375750	5.508000	29.884714	6.4800
10.01.2022	6.480000	40.855750	5.508000	35.392714	6.4800
11.01.2022	6.480000	47.335750	5.508000	40.900714	6.4800
12.01.2022	6.480000	53.815750	5.508000	46.408714	6.4800
13.01.2022	6.480000	60.295750	5.508000	51.916714	6.4800
14.01.2022	6.480000	66.775750	5.508000	57.424714	6.4800
15.01.2022	6.480000	73.255750	5.508000	62.932714	6.4800
16.01.2022	3.944415	77.200165	3.944415	66.877129	3.9444
17.01.2022	3.389520	80.589685	3.389520	70.266649	3.3895
18.01.2022	4.562625	85.152310	4.562625	74.829274	4.5626
19.01.2022	6.480000	91.632310	5.508000	80.337274	6.4800
20.01.2022	6.480000	98.112310	5.508000	85.845274	6.4800

21.01.2022	6.480000	104.592310	5.508000	91.353274	6.4800
22.01.2022	6.480000	111.072310	5.508000	96.861274	6.4800
23.01.2022	6.480000	117.552310	5.508000	102.369274	6.4800
24.01.2022	6.480000	124.032310	5.508000	107.877274	6.4800
25.01.2022	6.480000	130.512310	5.508000	113.385274	6.4800
26.01.2022	6.480000	136.992310	5.508000	118.893274	6.4800
27.01.2022	6.480000	143.472310	5.508000	124.401274	6.4800
28.01.2022	6.480000	149.952310	5.508000	129.909274	6.4800
29.01.2022	4.150725	154.103035	4.150725	134.059999	4.1507
30.01.2022	3.613200	157.716235	3.613200	137.673199	3.6132
31.01.2022	3.024000	160.740235	3.024000	140.697199	3.0240
Total	160.740235		140.697199		160.5097
Percentage Availability for the month	80.02%		70.53%		

*Appears to be an inadvertent error, this figure should have been 5.508 MU

** Appears to be an inadvertent error; this figure should have been 1.559908 MUs; the Petitioner and Respondent are to reconcile these figures during final reconciliation based on the outcome of this order.

89. From the above table and submissions of the Petitioner and Respondent, it comes out that the monthly availability declared by the Petitioner in energy terms is **160.740235 MU which translates into 80.02%** $\{(160.740235 \times 10^5) / (270 \times 31 \times 24)\}$ in percentage terms, 270 MW being the contracted capacity. The monthly normative availability @ 85% works out to 170.748 MU ($270 \times 31 \times 24 \times 0.85 / 1000$). The Petitioner has accordingly submitted that in terms of various provisions of the APP, it is entitled to receive fixed charges of Rs.26.20 crore (**$160.740235 \times 1.63 / 10$**) corresponding to availability declared of 160.740235 MUs and is further liable to damage (disincentive) of Rs.0.41 crore (for declaring less availability to the tune of 10.01 MU ($170.748 - 160.740235$) in comparison to monthly normative availability of 170.748 MUs, additional damage rate being Rs.0.410/kWh (25% of fixed charges i.e Rs.1.63/kWh). On the other hand, Respondent no.2, relying on article 11.3. 2 of APP, has restricted the payment of fixed charges (Rs.1.63/kWh) on a daily basis to an energy corresponding to 85% of daily Contracted energy, i.e 5.508 MUs ($270 \times 24 \times 0.85 / 1000$) for the days when the declared availability was more than 85% e.g. for 1.1.2022, the declared energy was 6.48 MUs (energy corresponding to 100% of CC) as against energy of 5.508 MUs (85% of CC) for which (5.508 MUs) the fixed charges have been admitted by the respondent no.2. For days when declared energy is less than energy corresponding to 85% of CC i.e. 5.508 MUs e.g. 3.024 MUs for 31.1.2022, the same (3.024 MUs) has been admitted to by the Petitioner for payment of fixed charges. The gap of 0.972 Mus ($6.48 - 5.508$) in case of excess declaration above 85%, as cited above for date 1.1.2022, has not been considered by the Respondent to be a part of monthly availability for payment of fixed

charges. Accordingly, the Respondent, by way of restricting the payment of fixed charges on a daily basis, has paid fixed charges corresponding to **140.697199 MUs (70.53%) as against the monthly declared availability of 160.740235 MU (80.02%).**

90. The Petitioner has argued that such action on the part of Respondent no.2 is against the ABT mechanism and CERC Tariff Regulations, which allow consideration of monthly availability on a cumulative basis for payment of fixed charges, incentive and disincentive for the availability declared by the Petitioner. The petitioner has also contested that if the Respondent is allowed to restrict the payment of fixed charges corresponding to 85% on a daily basis, then the Petitioner would never be able to recover annual fixed charges for energy corresponding to 85% even after declaring monthly and annual availability of 85%.

91. Respondent no 2 has submitted that the provisions in the PSA clearly state that the Aggregator **shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding 85% (eighty five per cent) thereof and in the event it supplies electricity to the Utility in excess of such 85% (eighty five per cent), such excess supply shall be eligible only for payment of Variable Charge, save and except the payment of Incentive due under the provisions of PSA.** Respondent has further submitted that the aforesaid provision makes it abundantly clear that the payment of Fixed Charges is to be made with relation to the Availability while capping the Availability on a daily basis at 85%, the Normative Availability, and for any excess over and above 85% Normative Availability, the excess supply shall be eligible only for payment of Variable Charge and/or Incentive [if applicable]. Respondent submitted that entirely in conformity with the above provision in the PSA, the Fixed Charges admissible for PTC India Ltd. have been determined by computing the Fixed Charges payable in respect of every day to be on the basis of actual Availability or 85% (Normative Availability), whichever is lower. Payments made on such basis are entirely in conformity with the provisions of the APP as well as the PSA. Provisions of Clause 11.3.2 are clear and unambiguous and do not permit payment of any Fixed Charges for any day for more than 85% of the Normative Availability. The Petitioner is seeking to place a misconceived and impermissible interpretation on the provisions of the Agreement to seek to contend that the cumulative monthly Availability is to be computed for payment of Fixed Charges, such interpretation being in complete contravention of the clear and unambiguous provision of Clause 11.3.2 and as such, the relief sought by the Petitioner, in effect, is a prayer to seek a unilateral amendment of the contract between the parties, and effectively seeking deletion of Clause 11.3.2 of the APP/PSA. The contention of the Petitioner to effect as if the answering Respondent is seeking to re-work the Availability of its generating station, is entirely misconceived and misleading. Answering Respondent has, in the present facts, neither contested nor

reworked the declared Availability of the Petitioner, however, for computing the fixed charges payable, KSEBL has strictly followed the provisions of the PSA and limited the Fixed Charges to 85% Availability on daily basis and for Availability exceeding 85%, Incentive corresponding to 50% Fixed Charges has been allowed, as envisaged under the Agreement. This is the mechanism provided under clause 11.3.2 of the PSA. It is further submitted that in Article 1 of the PSA, under the “Definitions and Interpretation” cause, it is clearly provided in clause (j) as under:-

“any reference to day shall mean a reference to a calendar day”

Further, as per clause 1.4.2, in case of ambiguities or discrepancies within the Agreement, the following principle shall apply: -

“Between two or more clauses of this Agreement, the provisions of a specific clause relevant to the issue under consideration shall prevail over those in other clauses”.

The above-mentioned clauses, read with the provision of Clause 11.3.2 of the Agreement, leave no scope for any doubt or ambiguity that the payment of Fixed Charges for any quantum more than 85% Normative Availability on any day – is **prohibited** under the provisions of the Agreement, and there is no permissibility for the Petitioner to claim any such payment, in complete contravention of the terms of the Agreement. The reliance placed by the Petitioner on other provisions of the Agreement, including Clauses 5.1.4, 11.1.1, 11.1.2, 11.2, 11.3.1 and 11.5.3, is entirely misplaced and misconceived. The aforesaid Clauses deal with other aspects under the entire framework of the Agreement. However, none of the said Clauses suggests the interpretation sought to be claimed by the Petitioner, which interpretation is directly contrary / opposed to the clear and unambiguous wording of Clause 11.3.2 of the Agreement. There is no permissibility for the Petitioner to claim any relief by relying on selective portions of the Agreement, devoid of context, which would be contrary to the provision directly dealing with the issue in question i.e. Clause 11.3.2. Any such contention of the Petitioner would also deserve to be rejected, *inter alia*, in view of the mandate of Clause 1.4.2 of the Agreement.

92. We have considered the rival submissions, in our opinion, the meaning which can be attached to clause 11.3.2 is that for a day of a billing month when energy declared is more than 85% (normative availability), fixed charges for the day shall be restricted to an energy corresponding to 85% of Contracted Capacity. However, clause 11.3.2 does not in any way debar consideration of the energy declared above 85% during any day to be a part of the monthly/yearly availability. Respondent 1 also does not agree with the interpretation of Article 11.3.2 by Respondent No.2. Respondent 2 has agreed to the fact that it has neither

contested nor reworked the declared Availability of the Petitioner for computing the fixed charges payable, it has strictly followed the provisions of the PSA and limited the Fixed Charges to actual Availability or 85% (Normative Availability), whichever is lower, on a daily basis. Further, we note that as per clause 11.3.2, the energy declared above 85% during a day is to be considered for payment of Incentive due under the provisions of Clause 11.3 .1. It is noted that Clause 11.3.1 provides that in case yearly availability above 85%, which includes availability declared above 85% during any day of the year, gets dispatched it shall be eligible for incentive as per clause 11.5.1. On scrutiny of Clause 11.5.1, it is revealed that in case there is monthly availability above 85%, which includes availability declared above 85% during any day of the month, gets dispatched, it shall be eligible for incentive @ of Rs.0.815/kWh (50% Of AFC) for the energy supplied above 85% of contracted capacity. As such, the overall consideration of the provisions reveals that 85% is the reference availability for payment of fixed charges and incentives for any time period, be it for a day or a month i.e. if the monthly availability is more than 85%, the energy declared up to 85% shall be eligible for fixed charges and energy declared beyond 85% shall be eligible for incentive if the same gets dispatched. As such, the fixed charges calculated on a daily basis as per clause 11.3.2 get re-casted to a calculation made on a monthly basis in terms of clause 11.5.1.

93. In case of short declaration below 85% on a monthly basis, **which is the example case for the month of January 2022**, there is the provision of “Damages”, i.e. clause 11.5.2 which is reproduced as below:

11.5.2 In the event that Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability and in addition, any reduction below the Normative Availability shall be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability, For the avoidance of doubt, the Parties agree that the Damages to be deducted for any reduction in Normative Availability shall be 25% (twenty five per cent) of the Fixed Charge which is reduced on account of shortfall in Availability below Normative availability.

94. Based on the above clause, there is an explicit provision for short declaration below 85% on a monthly basis. But there are two damages for short declaration-

a) *Damage 1 - Fixed Charge for such month shall be reduced to the extent of shortfall in Normative Availability.*

The fixed charge for January 2022 is Rs.27.83 crore (270x24x31x0.85x1.63/10000) for monthly normative availability of 170.748 Mus) and the shortfall in normative availability is 10.01 MUs (170.748-160.740235). Fixed charges corresponding to this shortfall of 10.01 MUs are Rs.1.63 crore (10.01x1.63/10). Accordingly, the fixed

charge payable to the petitioner for January 2022 after accounting for Damage 1 is Rs.26.20 crore which is nothing but fixed charges @Rs.1.63/kWh for declared availability of 160.740235 MU (80.02%).

b) *Damage 2- in addition----- Damages to be deducted for any reduction in Normative Availability shall be 25% (twenty five per cent) of the Fixed Charge, which is reduced on account of shortfall in Availability below Normative Availability.*

The additional damage for short declaration of 10.01 MU @ Rs0.41/kWh (25% of fixed charge, i.e Rs.1.63/kWh) works out to Rs.0.41 crore.

95. As such, the total amount payable to the Petitioner for January 2022 works out to Rs.25.79 crore (26.20-0.41) after accounting for damages based on clause 11.5.2, which allows recasting of fixed charges calculated on a daily basis based on 11.3.2. The same is in line with the submission of the Petitioner that payment of fixed charges and damages shall be in terms of monthly availability declared by it.

96. We further note that there cannot be a difference between availability for fixed charges and availability for incentive purposes. If the contention of the Respondent is agreed upon, then for fixed charges, the availability considered shall be **140.697199 MUs (70.53%), and the** availability considered for additional damage (damage-2) is 160.740235 MUs (80.02%). As such, the gap of 20.04 MUs (160.740235-140.697199) remains unpaid i.e **neither it gets fixed charges nor it gets incentive in spite of the fact that the same was declared as a part of monthly availability and was also availed of by the respondent in terms of energy drawn from the generating station. If the contention of the Respondent of restricting the fixed charges based on the daily capping in terms of clause 11.3.2 without referring to other relevant clauses pertaining to monthly reconciliation, is agreed to, then the Petitioner would never be able to recover full fixed charges if it declares availability below normative availability even for one day, which defeats the aim of recovery of full fixed charges on the declaration of normative availability.**

97. Accordingly, based on the above deliberations, we reject the submissions of the Respondent KSEBL and hold that the Petitioner is entitled to payment of fixed charges, with reference to the normative availability achieved on a monthly basis. Accordingly, the Respondent KSEBL shall undertake the reconciliation of the fixed charges, incentives, and damages and make the differential payment for the months for which it has deducted the fixed charges based on the application of Article 11.3.2. The differential payment in fixed charges shall be payable by the Respondent with interest as agreed in APP at Articles 24.3 and 24.4 for the period from the due date to the date on which actual payment is made by

Respondent no 2.

Whether the action of Respondent no 2 in availing of the rebate without paying the full amount as was billed by the Petitioner is as per the provisions of APP/PSA.

98. With regard to the rebate availed of by the Respondent on part payment made within the stipulated time after raising of the invoices by the Petitioner, the Petitioner has submitted for the power supplied during the month of January 2022, JITPL had raised an Invoice on 03.02.2022 claiming a tariff payment of Rs. 52,75,59,650/- from PTC. However, PTC, on 09.02.2022, made a payment of Rs. 48,93,44,801/- only against JITPL's claim of Rs. 52,75,59,650/-. Further, PTC/KSEBL has illegally availed of a rebate of 1% totalling Rs. 49,48,206/- on the Invoice amount without making full payment of the Invoice. Similarly, Rs. 3,20,33,447/- has been deducted from the February 2022 bill, and also rebate has been availed (rebate details are awaited). Hon'ble Supreme Court in **T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd, (2014) 11 SCC 53 ("PPN Judgment")** has held that rebate/discount cannot be claimed by the Distribution Licensee if there is failure to make complete and full payment of the amount under the Monthly Bills. A rebate will not be applicable if part payment is made:-

*"71. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part-payment of the monthly invoices within 5 business days. We have noticed earlier that it was a precondition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, APTEL has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by APTEL. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. **Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed.** Under Articles 10.3(a) to (c) of the PPA, letter of credit is to be established covering three months estimated billing, one month prior to commercial operation date. Under Article 10.3(d) of the PPA, an escrow account is to be established by the appellant in favour of the power company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2(e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it*

would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of APTEL on this issue do not call for any interference.

72. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for compensation payment and billing. We are also not able to accept the submission of Mr Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part-payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices.”

The Petitioner has further submitted that in view of the aforesaid position of law, it is submitted that PTC/KSEBL is not entitled to avail of the rebate of 1% totalling Rs. 49,48,206/- on the admitted amount since PTC/KSEBL has failed to make complete and full payment of the Monthly Invoice dated 03.02.2022 raised by JITPL. Hence, PTC/KSEBL ought to be directed to refund the same along with applicable interest on such delayed payment.

99. Petitioner has further submitted that the Hon’ble Supreme Court in PPN **Judgment** has held as under: -

(a) Unilateral deductions from monthly bills by a party without adjudication are illegal [Para 72].

(b) Payment of Tariff Invoices has to be made in full when due, even if the entire portion or a portion of the invoice is disputed [Para 71].

100. Referring to the above judgment of the Hon'ble Supreme court, the Petitioner has submitted that such unilateral deductions made by PTC/KSEBL without raising any dispute over the Monthly Invoice dated 03.02.2022 is per-se illegal, arbitrary and in direct violation of the Hon'ble Supreme Court's PPN Judgment.

101. Per contra, KSEBL, the Respondent no.2 has submitted that in terms of Article 11.10 of the PSA, in the event the Utility pays the Tariff within 5 (five) days of the date of submission of the invoice thereof, it shall be entitled to deduct 1% (one per cent) of the amount comprising the Tariff by way of discount for early payment.

102. KSEBL has quoted article 11.10 for reference as under:-

"11.10 Discount for early payment

The Parties expressly agree that in the event the Utility pays the Tariff within 5 (five) days of the date of submission of the invoice thereof, it shall be entitled to deduct 1% (one percent) of the amount comprising the Tariff by way of discount for early payment."

103. Based on the above submissions, KSEBL has contended that in the facts of the present case, the monthly invoices paid by KSEBL are within the stipulated date as per the PSA, and therefore, KSEBL is entitled to claim a rebate on the payment made. It is submitted that KSEBL has rightly claimed rebate only for the amount paid by KSEBL and not for the entire invoice amount, wherein the Petitioner had also raised certain inadmissible claims which have been correctly rejected by KSEBL.

104. The rival contentions have been considered. In terms of the Appellate judgment upheld by the Supreme Court as quoted by the Petitioner (reference para 98 above), for the purpose of availing rebate on the billed amount, the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Accordingly, the Commission considers it appropriate that since the Respondent has short-paid the invoice by disputing part amount, it was not entitled to rebate. In view of the above deliberations, Commission directs the Respondent to return the rebate availed it.

105. Petition no. 108/MP/2022 is disposed of in terms of the above.

Sd/-	sd/-	sd/-	sd/-
(P.K.Singh)	(Arun Goyal)	(I.S. Jha)	(Jishnu Barua)
Member	Member	Member	Chairperson