

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 182/MP/2022

Coram:

Shri Jishnu Barua, Chairperson

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 15th May 2024

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for the adjudication of disputes between the Petitioner – Jhabua Power Limited and the Respondents – PTC India Ltd & West Bengal State Electricity Distribution Company Limited.

And

In the matter of

Jhabua Power Limited,

Unit No. 303 & 307, 3rd Floor,

ABW Tower, M.G. Road

Gurugram - 122002, Haryana

.....Petitioner

Vs

1. PTC India Limited and Anr.,

2nd Floor, NBCC Tower,

15, Bhikhaji Cama Place, New Delhi-110066

2. West Bengal State Electricity Distribution Company Limited,

Bhavan, 7th Floor,

DJ Block, Sector-II,

Salt Lake, Kolkata, West Vidyut Bengal-700071

.....Respondents



ORDER

The Petitioner, Jhabua Power Limited (in short, 'JPL'), has filed this petition seeking approval for the resolution of certain disputes that have arisen under the medium-term PPA dated 26.10.2018 (hereinafter referred to as "PPA") with Respondent No. 1- PTC India Limited (hereinafter referred to as "PTC") for the supply of 100 MW for 3 years under the Pilot Scheme of Government of India wherein PTC had acted as an aggregator and, in turn, had executed a back-to-back agreement with Respondent No. 2- West Bengal State Electricity Distribution Company Limited (hereinafter referred to as "WBSEDCL").

2. The Petitioner is a generating company as defined under section 2(28) of the Electricity Act, 2003, and has set up a coal-based thermal generating station, comprising one unit of 600 MW, located near village Barela-Gorakhpur, Tehsil-Ghansore of Seoni District, Madhya Pradesh. The Petitioner has entered into agreements for the sale of electricity with the Respondents, as tabulated below:

Date of PSA/PPA	Procurer	Quantum (% or MW of Installed Capacity)	Tenure (Yrs)
27.6.2011	Government of Madhya Pradesh	5%	25
5.1.2011	Madhya Pradesh Power Management Company Limited	30%	20
26.12.2014	Kerala State Electricity Board Limited	100 MW	25
31.12.2014	Kerala State Electricity Board Limited	115 MW	25
26.10.2018	West Bengal State Electricity Development Company Limited (through PTC)	106.7 MW (100 MW ex-bus)	03

3. The Petitioner has prayed as under:



- (a) *Declare that the claim for compensation made by PTC on JPL under Article 10.2 of the PPA is wrongful;*
- (b) *Direct PTC not to seek compensation from JPL either against short supply of electricity or against open access charges.*
- (c) *Direct PTC to pay JPL back Rs 27.03 Cr wrongfully deducted as compensation;*
- (d) *Direct PTC to pay the interest on the above amount as per Article 24.2.*
- (e) *Direct PTC to pay the LPSE of Rs. 50,03,944 (Rs. Fifty Lakhs Three Thousand Nine Hundred Forty-Four) for the delayed payments of JPL bills*
- (f) *Direct PTC to pay the carrying cost on the LPSE as above.*
- (g) *Pass such orders as deemed fit and necessary in the facts and circumstances of the present case.*

Submission of the Petitioner: -

4. In support of the prayers above, the Petitioner, in the instant petition, has made the following submissions:

- a) The Ministry of Power (MoP), Government of India, vide Notification No. 23/17/2013 R&R, dated 06.04.2018, introduced a Pilot Scheme to facilitate procurement of power of 2500 MW under medium-term for 3 years from the generating companies having coal-based power plants. The Ministry of Power also issued the Model Pilot Agreement for Procurement of Power. The said scheme was introduced to assist the "stressed" power plants on account of the non-availability of Power Purchase Agreements (PPAs). The tariff, under the said scheme, is fixed for a period of three (3) years. It is pertinent to mention herein that the above-mentioned scheme was introduced on account of the 37th Parliamentary Report issued by the MoP.
- b) The petitioner executed a medium-term PPA with Respondent No. 1/PTC India Ltd. (hereinafter referred to as 'PTC') on 26.10.2018 for the supply of 100 MW for 3 years from the appointed date under the Pilot Scheme of the Government



of India wherein the PTC had acted as an aggregator and, in turn, had executed a back-to-back agreement with Respondent No. 2/West Bengal State Electricity Distribution Company Limited (hereinafter referred to as 'WBSEDCL') on 29.10.2018.

- c) A dispute has arisen between JPL and PTC regarding the short supply of electricity for the month of October 2021 and the payment of a Late Payment Surcharge on 3 bills of JPL that PTC paid beyond a period of 30 days.
- d) JPL had scheduled a planned outage for the annual overhauling of its unit in October 2021, which was to take around 22 days. The overhauling was to take place by taking the unit off the bar on 02.10.2021 from 00:00 hours. JPL had not unilaterally decided this, but it had communicated this plan both to PTC and WBSEDCL as early as March 2021.
- e) At the time of intimating the above plan, JPL had envisaged that it would make an endeavour to substitute its supply by procuring electricity through day ahead/ bilateral sources as was done by it in earlier instances when the unit was taken for overhauling or went under forced outage. Financial Year wise details of the above are as follows:

Financial Year	Availability from JPL		Availability from Alternate Source		Cumulative Availability	
	MUs	(%)	MUs	(%)	MUs	(%)
FY-20	689.93	79%	49.23	5.6%	739.16	84.4%
FY-21	839.49	95.83%	20.12	2.3%	859.61	98.13%
FY-22	697.98	83.57%	23.46	2.68%	721.44	86.38%

- f) Declared availability while scheduling from alternate sources (substitute supply during the periods of outage) was restricted to the quantum, which PTC agreed to schedule on a day-ahead basis. For example, if PTC desired to schedule 55



MW, the availability was declared as 55 MW only. It is stated that JPL was in a position to arrange a full quantum of substitute supply had PTC so desired. However, JPL took into account the requirements of PTC/WBDESCL while arranging the substitute supply.

- g) Accordingly, if the availability was considered 100% during the periods of substitute supply, the revised availability figures from alternate sources for the FY20, FY21, and FY22 would be 89.51 MUs (10.18%), 36.58 MUs (4.18%) and 42.65 MUs (4.87%), respectively. The resultant cumulative availability comes to 779.44 MUs (89.18%), 876.07 MUs (100%), and 740.43 MUs (88.44%) for FY20, FY21, and FY22, respectively. The average availability for the three years of PSA was very high @ 92.64%.
- h) However, for the 22-day overhauling period, JPL was unable to arrange a substitute supply from any source due to the non-availability of power and the extremely high rates in the short-term power market during October 2021. This situation was not envisaged, and there was an unprecedented coal crisis throughout the country. As a result, the availability of the unit from JPL's plant in October 2021 was reduced to 21.4%.
- i) Vide email dated 11.10.2021, PTC indicated attraction of Article 10.2.3 of the PPA *"In case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has been approved, then the Supplier shall pay to Aggregator a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Supplier shall also pay the applicable transmission charges*



to the extent not supplied to the Aggregator, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA". It was apparent that PTC was taking the position that Article 10.2.3 gets automatically triggered, and there is a strict liability on JPL to pay the compensation in case of a reduction in availability.

- j) JPL responded to the above email by its letter dated 12.10.2021, pointing out that it was under scheduled maintenance and was unable to arrange the substitute / alternate supply due to the unprecedented shortage of power and high market rates. JPL claimed relief from paying the compensation and also sought to resolve the issue under Article 16.10 of the PPA, which provided for reconciliation in the case of 'Unforeseen Events.'
- k) On 08.11.2021, PTC raised a compensation invoice amounting to Rs. 24.85 Crores on JPL. JPL once again reiterated its conciliatory efforts to waive the compensation in its letter dated 16.11.21.
- l) On 02.12.2021, PTC raised a revised invoice on JPL seeking an amount of Rs. 27.03 Crores, including the open access charges.
- m) On 09.12.2021, JPL, in addition to reiterating its earlier claim, also pointed out that as per the CERC (Sharing of Interstate Transmission Charges and Losses) Regulations, 2020, which were applicable from 01.11.2020, no transmission charges would be applicable for purchasing electricity under STOA (Short Term Open Access) and Collective Transactions (DAM and RTM) for such distribution companies having LTA and LTOA.
- n) The Commission, while framing the Sharing Regulations, 2020, has already factored in a case where the distribution company/licensee has been granted LTA/LTOA and then applies for STOA. In such cases, no charges are levied on



the Distribution Companies/Licensees for purchasing power under STOA and collective transactions (DAM and RTM). There was, therefore, no liability on PTC for any additional transmission charges and no prima facie case for claiming compensation towards transmission charges.

- o) On 16.12.2021, when JPL found that there was no response to its conciliatory efforts, JPL, by a detailed letter, apart from reiterating the request for a waiver from the compensation, also pointed out to PTC that the compensation could not be claimed since there was no loss caused to PTC/WBSEDCL by way of short supply or inability of JPL to arrange for substitute supply. JPL pointed out that during the period from 02.10.2021 to 25.10.2021, WBSEDCL had surplus power and was continuously selling the same in the exchange. Since the claim of compensation by PTC is in the nature of liquidated damages, the sine qua non of claiming the compensation would be a loss suffered by PTC/WBSEDCL, which is not the case.
- p) On 23.12.2021, a tripartite meeting took place between the representatives of JPL, PTC, and WBSEDCL at Kolkata, during which JPL explained the above aspects. Vide letter dated 24.12.2021, JPL again called upon PTC to resolve the issue of compensation claimed by PTC and also sought to invoke the conciliatory process under Article 16.10.
- q) By email dated 27.12.2021 to PTC, JPL intimated that as per the decision of the tripartite meeting dated 23.12.2021, it was mutually decided that JPL will send the proposal against compensation raised by PTC and also requested to keep the issue in abeyance until any resolution comes in this regard.
- r) In an email dated 04.01.2022, JPL reiterated that it has proactively proposed a possible resolution and is always ready to engage in any conversation to



amicably resolve the issue. JPL further requested PTC to release the payments for the energy supplied.

- s) By letter dated 10.01.2022, PTC informed JPL that it would deduct the compensation amount from its monthly invoices of JPL and also effected such deductions against the monthly energy bills for December 2021 and January 2022.
- t) By letters 11.01.2022 & 17.01.2022, JPL reiterated its request for resolution of the disputes and even proposed to supply the quantity of electricity short supplied by it during the month of October 2021 to PTC/ WBSEDCL at a tariff equal to fuel cost (would have cost PTC / WBSEDCL approx. Rs 2.60 per unit instead of tariff rate of Rs 4.24 per unit).
- u) On 28.02.2022. JPL again called upon PTC to proceed with conciliation under Article 16.10 through a conciliation tribunal.
- v) However, by letter dated 21.03.2022, PTC refused to proceed with conciliation and advised JPL to seek dispute resolution under Section 86(1)(f) of the Electricity Act, 2003.
- w) When all its attempts failed, JPL, by its letter dated 22.03.2022, informed PTC that it would be seeking the dispute resolution under Section 79(1)(f) of the Electricity Act, 2003 since it has a composite scheme of generation and sale of electricity and is amenable to the jurisdiction of this Commission.

REFUSAL TO ADMIT THE PAYMENTS DUE TO THE PETITIONER AGAINST LATE PAYMENT SURCHARGE

- x) Another issue that arose between JPL and PTC was with regard to the Late Payment Surcharge (LPS) for the supply of power in the months of June 2019,



August 2019, and April 2020. The bills for all three months had been paid by PTC beyond the due date, and the LPS works out as under:

Month	Bill Date	Gross Billed (In Rs.)	Net Recd (In Rs.)	Receipt Date	Due Date	Delay (Days)	Interest (In Rs.)
June '19	01.07.19	20,80,94,234	20,80,94,234	19.08.2019	31.07.2019	19	15,21,939
Aug '19	02.09.19	19,08,56,523	19,08,56,523	01.11.2019	02.10.2019	30	21,88,314
April '20	01.05.20	16,46,72,039	16,46,72,039	01.07.2020	31.05.2020	31	12,93,691
Total Amount (in Rs) 50,03,944.00							

y) JPL had written several letters and emails to PTC, including letters dated 03.09.2021, 04.10.2021, 08.11.2021, and an email dated 23.03.2022. There was no response to the above letters, and instead, PTC is seeking JPL to restrict its claim of LPSE from Rs. 50 lacs to Rs. 16.49 lacs, leaving some of the invoices.

In the above circumstances, JPL filed the present petition, seeking dispute resolution on the following, amongst other grounds.

- i) Article 10.2 of the PPA is intrinsically linked with Article 10.2 of the PSA. It cannot be that PTC can demand or deduct compensation from JPL without a corresponding demand or deduction of compensation by WBSEDCL from PTC. There is neither such a demand nor deduction made by WBSEDCL on PTC to this date.
- ii) The PPA and PSA are on a back-to-back basis, and PTC cannot act in respect of either demand or deduct compensation in a unilateral manner without there being a simultaneous or parallel demand or deduction by WBSECL. All obligations of PTC qua JPL are on a back-to-back basis with the obligations of WBSEDCL qua PTC.



- iii) The compensation under Article 10.2.3 *“In case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has been approved, then the Supplier shall pay to Aggregator a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Supplier shall also pay the applicable transmission charges to the extent not supplied to the Aggregator, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA”* and Article 10.2.4 *“Above compensation shall be calculated on daily basis and the invoice shall be raised by the Aggregator or the Supplier as the case may be on monthly basis and payment shall be made within 30 days from the date of receipt of the invoice. For any delays in payment, surcharge shall be payable for the period of delay, at the rate of 15% per annum”* of the PPA and PSA are in the nature of liquidated damages, which are a genuine pre-estimate of the losses that would be suffered by PTC in case JPL would not make the contracted capacity available. The claim for damages can arise only if a loss has been suffered by PTC, and it is not that the compensation will be automatically deducted or levied without proof that a loss has been suffered.
- iv) As per the CERC (Sharing of Interstate Transmission Charges and Losses) Regulations, 2020, which have become applicable from 01.11.2020, no transmission charges are applicable for purchasing electricity under STOA (Short Term Open Access) and Collective Transactions (DAM and RTM) for such distribution companies having LTA and LTOA such as WBSEDCL.



- v) It is a well-settled principle that damages are not in the nature of strict liability. Damages can be either liquidated or unliquidated. In the case of liquidated damages, the parties provide for the quantum of damages at the stage of the contract itself, while in the case of unliquidated damages, the quantum of damages needs to be proved by leading evidence. However, in both cases, the fact that loss has been suffered needs to be proved, and this fact has not been proved by PTC.
- vi) Despite JPL giving the details to PTC / WBSEDCL of not suffering any losses due to short supply by JPL, this has never been controverted by PTC / WBSEDCL in any of their correspondence. PTC has simply not paid the bills of JPL and is illegally holding on to the compensation amount. A party claiming damages has to necessarily demonstrate the actual loss suffered by it.
- z) Without discharging the proof of suffering a legal injury or loss or damage as a result of non-supply by JPL for October 2021, the first principle for claiming the compensation itself is not met. Furthermore, there is no answer by PTC to the aspect that during the period from 02.10.2021 to 21.10.2021, when the entire country was dealing with power shortage, WBSEDCL has consistently sold the power in the day head market at extremely high rates. Thirdly, the compensation Article 10.2.3 would get triggered only if due to nonsupply by JPL and also not arranging the substitute supply, a loss is caused to either PTC or WBSEDCL. There is never any whisper by PTC in any of its correspondences that it has suffered a loss.
- aa) The Commission, in several cases pertaining to back-to-back PPA/PSA where compensation for short supply has been claimed, has held that the



compensation would be payable under the PPA only if there is a loss suffered by the ultimate purchaser under the PSA and also if there is a corresponding claim made by the purchaser on the intermediary under the PSA. (Ref. Order date 11.10.2017- in Petition No. 304/MP/2013- M/s Godavari Green Energy Ltd. vs. NTPC Vidyut Vyapar Nigam Ltd. & Ors.)..

- bb) JPL made all efforts to resolve the issue through conciliation as contemplated in Article 16.10 of the PPA, which pertains to relief for unforeseen events and has been provided in the PPA apart from Force Majeure. The intention of Article 16.10 is to grant relief for unforeseen events by way of a Conciliation Tribunal. However, PTC has frustrated JPL's conciliation efforts.
- cc) JPL offered to supply the electricity short supplied by it in October 2021, even at energy charges to PTC/WBSEDCL. However, neither PTC nor WBSEDCL showed any intention to resolve or reconcile the matter.
- dd) PTC delayed the payment of the invoices dated 01.07.2019, 02.09.2019, and 01.05.2020 raised by JPL by a period of 19 days, 30 days, and 31 days, respectively. As per Article 24.4 of the PPA, if the monthly bills are not paid within 30 days, interest for the period of delay will be calculated at a rate of 5% above the bank rate. Article 24.3 also provides that interest shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly risks. Accordingly, PTC is liable to pay the late payment surcharge of Rs. 50,03,944. This amount was payable as early as 04.10.2021, and it will attract further interest / carrying costs.
- ee) PTC has sought to reduce its claim of LPSE from Rs. 50 lakhs to Rs. 16.49 lakhs, which is not acceptable to JPL. PTC is liable to pay the LPS as per the terms of the PPA agreed between the parties.



Reply of the Respondents PTC India Ltd.

5. The Respondent, PTC, vide affidavit dated 12.1.2023, in its reply to the petition submitted as under:

- a) As per Article 10.3 of the PAPP/PPSA, the Petitioner was under a contractual and legal obligation to supply power from an alternate source during the scheduled maintenance, unscheduled maintenance, or force majeure. This clause leaves no ambiguity that the Petitioner is required, at all times, to maintain the supply of power to the extent of the normative capacity, i.e., 85%, and in case the deviation in declared availability is more than 15% of the contracted capacity, then the Petitioner is to pay compensation as per Article 10.2.3.
- b) That Respondent No.1, vide email dated 18.10.2021, forwarded the letter of the Petitioner to Respondent No.2 regarding the occurrence of an “Unforeseen Event.” However, Respondent No.2 did not agree with the contention of the Petitioner regarding the occurrence of the “Unforeseen Event”, and vide Memo No. C/BP/PTC/Stressed/253 dated 01.12.2021 raised a compensation of amount 27,03,76,545/- against the short supply for the month of October 2021.
- c) Similarly, PTC also raised compensation on 08.11.2021 of Rs.24,84,92,247/- towards compensation for default in scheduling power during October 2021, along with the calculation. Subsequently, Respondent No.1 raised a further invoice on 02.12.2021 for Rs.2,18,84,298/- for payment of open access charges, as Respondent



No.2 had raised an invoice on Respondent No. 1 for payment of such charges.

- d) With the intention to resolve the issue of compensation amicably, a tripartite meeting was held. In the said meeting, it was agreed that the Petitioner would send a proposal for resolving the compensation issue, and the same would be subject to the approval of Respondent No.2.
- e) That the Petitioner vide letter dated 24.12.2021 reiterated its earlier stand and proposed that the Petitioner shall compensate the Respondent No.2 for the actual quantum purchased by it from the market against the short supply of power from Jhabua at Block wise rate, which shall be arrived by finding the difference between the market rate and Rs.4.42. The Petitioner further, vide mail dated 27.12.2021, requested that the matter be kept in abeyance till the issue is resolved.
- f) However, Respondent No.2, vide email dated 04.01.2022, informed that the compensation amount, as claimed earlier, shall be adjusted from any unpaid bill of PTC, and in case the amount is not paid, the same attracts a late payment surcharge.
- g) In turn, Respondent No.1 vide letter dated 10.01.2022 informed the Petitioner that *as no payment was received from JPL against the compensation invoice and to avoid adjustment from any unpaid bills of PTC Ltd. and levy of LPS, PTC was forced to deduct the same from Nov'21 and Dec'21 energy bills and made the corresponding payment of WBSEDCL.*
- h) As no payment was received from the Petitioner against the compensation invoice, Respondent No.1 was forced to deduct the amount from the



energy bills for the months of November 2021 and December 2021. The amount so deducted was paid to Respondent No.2.

REJOINDER ON BEHALF OF PETITIONER JHABUA POWER LIMITED

6. The Petitioner, vide affidavit dated 2.2.2023, in its rejoinder to the above reply of PTC, has submitted as under:

- a) Article 10.3 has several conditions attached, as explained in Para 10 above, and the Petitioner does not have an automatic obligation to ensure a substitute supply is available. Further, the claim of compensation because an alternate supply was not available is not tenable.
- b) There is no legal injury loss, or damage as a result of non-supply by the Petitioner. The first principle for claiming compensation is not met. Further, during the period from 02.10.2021 to 21.10.2021, when there was a power shortage, WBSEDCL consistently sold the power in the market at extremely high rates. Any compensation in this respect would only be triggered if, due to non-supply by the Petitioner and also non-arranging of the substitute supply, a loss is caused either to PTC or WBSEDCL. There has been no loss caused to either of the parties.
- c) PTC is confusing the issue instead of simply proving that it suffered a loss due to the Petitioner's non-supply of power. Without discharging this burden, PTC cannot simply rely on the principles of liquidated damages. As stated before, the quantum of loss need not be proved, but the fact that a loss has been suffered needs to be proved by PTC.
- d) Without prejudice to the above contentions that no compensation is payable by the Petitioner to PTC, and in the alternative, it is submitted that in case this Hon'ble Commission comes to the conclusion that compensation is payable, the compensation should be limited to the actual loss suffered by WBSEDL

REPLY ON BEHALF OF RESPONDENT WBSEDCL

7. The Respondent, WBSEDCL, vide affidavit dated 20.3.2023 in its reply to the petition, has submitted as under:



- a) On 04.01.2022, WBSEDCL notified PTC via email that compensation remained unreleased and warned of potential adjustment from unpaid bills if immediate payment was not made. Additionally, WBSEDCL mentioned the imposition of LPS as per norms. JPL correspondingly reached out to PTC on the same day, expressing readiness to discuss resolutions and urging payment release for energy supplied in November and December 2021.
- b) Following this, PTC responded to JPL on 10.01.2022, detailing the events surrounding JPL's Annual Overhaul Schedule (AOH) and subsequent claims for relief under "Unforeseen Events" provisions. As JPL did not make payment, PTC deducted the compensation amount from November and December 2021 energy bills. JPL, feeling unheard, reiterated its stance on 11.01.2022, citing unconsidered proposals and seeking to invoke of Article 16.10.
- c) On continued efforts by JPL to settle amicably, including proposing a conciliation tribunal on 28.02.2022, PTC on 21.03.2022 wrote to JPL in response to JPL's letter dated 28.02.2022 and inter-alia stated that as per PTC's legal counsel, all disputes between JPL, PTC and WBSEDCL under the PPA/PSA need to be settled through a mechanism under Section 86(1)(f) of the Electricity Act, 2003. JPL responded on 22.03.2022, underscoring the exhaustion of dispute resolution avenues and hinting at adjudication under the Electricity Act of 2003.
- d) With regard to payment for invoices dated 01.07.2019, 02.09.2019, and 01.05.2020, which were delayed by PTC by a period of 19 days, 30 days, and 31 days respectively, and JPL's claim of LPS in terms of Article 24.4 of the PPA, it is submitted that the foregoing invoices were paid by WBSEDCL. Accordingly, no claim survives against WBSEDCL on this count.

REJOINDER ON BEHALF OF PETITIONER JHABUA POWER LIMITED

8. The Petitioner vide affidavit dated 5.4.2023 in its rejoinder to the above reply of WBSEDCL has submitted as under:



- a) The contention of WBSEDCL regarding paying of transmission charges in respect to Medium Term Open Access charges and Long Term Open Access charges is wrong.
- b) It is reiterated that as per CERC (sharing of Interstate Transmission Charges & Losses) Regulations, 2020, no transmission charges shall be paid for purchasing electricity under STOA and collective transactions (DAM and RTM) for such distribution companies having LTA & LTOA.
- c) During the said period, no power was scheduled from JPL, which in fact power (if any) has been scheduled by WBSEDCL to compensate for the shortfall; the same LTA must have been utilized to procure the power (exchange or other bilateral contracts), and no additional transmission charges & Losses has been incurred by WBSEDCL/PTC. Therefore, the claims/deductions made by WBSEDCL are not tenable, and the Commission may consider appropriate directions for the release of the wrongful deductions along with the applicable Late Payment Surcharge ("LPSC").
- d) The Petitioner vide letter dated 24.12.2021 proposed compensating WBSEDCL for the actual quantum purchased by it from the market against the short supply of power from the Petitioner. However, evidence for the same was never submitted and instead, compensatory invoices were raised by PTC/ WBSEDCL.
- e) LPSC charges have been calculated for the supply of power in the months of June 2019, August 2019, March 2020, and April 2020. The bills for all three months had been paid by PTC beyond the due date.
- f) WBSEDCL has stated in its reply that it has released the payment of these bills timely to PTC. Therefore, it is evident that PTC has delayed the payment of these bills to JPL. Curiously, no response from PTC in their reply on this issue.
- g) Further, the Petitioner has written several letters and emails to PTC including Letters dated 03.09.2021, 04.10.2021, 08.11.2021, and an email



dated 23.03.2022 regarding payment of LPSC on delayed payment. However, there is no response to the above letters from PTC to date which demonstrates improper conduct on the part of PTC.

9. The order in the petition was reserved on 18.12.2023.

Analysis and Decision

10. We have perused and considered the submissions of the parties. The claim of the petitioner hinges mainly on two main issues: firstly, (i) the short supply of electricity on account of the overhauling of the power plant of the Petitioner for 22 days in the month of October 2021, and (ii) the payment of Late Payment Surcharge on 3 bills of JPL that PTC paid beyond a period of 30 days. These issues are dealt with in the following paragraphs:

Issue-I: Whether the Petitioner is liable to pay compensation charges, including transmission charges, for the short supply of power

11. The petitioner has executed a medium-term PPA with Respondent No. 1, i.e., PTC India Ltd.(PTC), for the supply of 100 MW for 3 years under the Pilot Scheme of the Government of India wherein the PTC had acted as an aggregator and in turn had executed a back-to-back agreement with Respondent No. 2, i.e., West Bengal State Electricity Distribution Company Limited (WBSEDCL).

12. A dispute has arisen between JPL and PTC about the short supply of electricity for October 2021 during a planned outage for the annual overhauling of its unit. JPL has intimated to PTC about the planned outage schedule in March 2021. It is noticed that during October 2021, there was a short supply of power upto 21.4% by JPL to PTC. As regards the short supply of power, clause 10.2.3 of the PPA dated 26.10.2018 provides as under:

“In case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has been approved, then the Supplier shall pay to Aggregator a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average



(RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall in excess of permitted deviation of 15%. Further, the Supplier shall also pay the applicable transmission charges to the extent not supplied to the Aggregator, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA.”

13. As regards supply from alternate sources, Article 10.3 of the PPA dated 26.10.2018 provides as under:

“10.3 Substitute Supply

In the event the Availability of the Power Station is reduced on account of scheduled maintenance, unscheduled maintenance or Force Majeure, the Supplier may, with prior consent of the Aggregator, which consent the Aggregator may deny in its sole discretion or convey acceptance with such conditions as it may deem fit, supply electricity from any alternative source, and such supply shall, for payment of Tariff, be deemed to be supply under and in accordance with the provisions of this Agreement. For the avoidance of doubt, the Parties agree that in the event the Aggregator rejects any supply of electricity offered hereunder from an alternative source, the Supplier shall be deemed to be in compliance with this Agreement for the purpose of determination of Availability and payment of Tariff.

It is hereby clarified that the Aggregator shall make payment of the Tariff to the Supplier for supply of electricity from any alternate source in accordance with this Article irrespective of the actual cost of supply of electricity from such alternative source.”

14. The Petitioner has, inter alia, contended that the Respondent, PTC, has claimed compensation of an amount of Rs. 27.03 Crores from the Petitioner for the short supply of power during the month of October 2021, including the open access charges as per clause 10.2.3 of the PPA dated 26.10.2018. As per clause 10.2.3 of the PPA dated 26.10.2018, in case of deviation in declared Availability from the Supplier side is more than 15% of the Contracted Capacity for which open access has



been approved, then the Supplier shall pay to Aggregator compensation on a monthly basis at the rate, which shall be the difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX) for such date, for the quantum of shortfall over permitted deviation of 15%.

15. Petitioner has further contended that compensation under clause 10.2.3 of the PPA dated 26.10.2018 is not to be triggered automatically, and the compensation under Clause 10.2.3 has to be seen as liquidated damages. Since the Respondent has failed to prove the actual loss suffered, it is not entitled to the claimed compensation. Without discharging the proof of suffering a legal injury or loss or damage as a result of non-supply by JPL for October 2021, the first principle for claiming the compensation itself is not met. Furthermore, there is no answer by PTC to the aspect that during the period from 02.10.2021 to 21.10.2021, when the entire country was dealing with power shortage, WBSEDCL has consistently sold the power in the day head market at extremely high rates. Thirdly, the compensation Article 10.2.3 would get triggered only if due to nonsupply by JPL and also not arranging the substitute supply, a loss is caused to either PTC or WBSEDCL. The Petitioner has also placed reliance on the decision of the Hon'ble Supreme Court in the cases of Construction and Design Services Vs. Delhi Development Authority (2015)14 SCC 236, Kailash Nath Associates v. DDA [(2015) 4 SCC 136] and the decision of Hon'ble Delhi High Court in the judgment dated 07.01.2016 in Engineers India Limited Vs. Tema India Limited FAO(OS)487/2015 to substantiate that the Respondent is not entitled to claim any compensation.

16. Respondents have reiterated their stance that as per Article 10.3 of the PAPP/PPSA, the Petitioner was under a contractual and legal obligation to supply power from an alternate source during the scheduled maintenance, unscheduled maintenance, or force majeure. This clause leaves no ambiguity that the Petitioner is required, at all times, to maintain the supply of power to the extent of the normative capacity, i.e., 85%, and in case the deviation in declared availability is more than 15% of the contracted capacity, then the Petitioner is to pay compensation as per Article 10.2.3.



17. We have considered the rival submissions of the parties and are of the view that the Petitioner's obligations under the PPA dated 26.10.2018 were not dislodged on account of an 'Unforeseen Event', therefore, the obligation of the Petitioner to supply power was never dislodged. Having failed to supply power during the month of October 2021, as the generating station was under scheduled maintenance, the Petitioner was in breach of its obligations as per clause 10.3 of the PPA dated 26.10.2018. Being in breach, the Respondent had no other option but to raise Compensation as per clause 10.2.3 of the PPA dated 26.10.2018. We find no fault in the Respondent raising the compensation by invoking Clause 10.2.3 of the PPA dated 26.10.2018 and claiming the said amounts from the Petitioner. Since the amounts have been claimed by the formula prescribed under clause 10.2.3 of the PPA dated 26.10.2018, which was agreed upon by both parties at the time of execution of the PPA, we see no reason as to why compensation should not be paid to the Respondent. The Petitioner cannot now contend that the Respondent has to prove actual loss/damage when the Petitioner agrees to this formulation. We are of the view that clause 10.2.3 of the PPA dated 26.10.2018 is a genuine pre-estimate of damages agreed upon by the parties at the time of execution since the compensation has been agreed to by the parties as a difference between the Tariff payable by the Aggregator and the daily Average (RTC) MCP Prices at the Power Exchange (IEX). Also, clause 10.2 of the PPA dated 26.10.2018 adequately protects the rights of both the Petitioner and Respondent since the Petitioner would also be entitled to claim compensation in case of deviation from the buyer (Respondent, PTC) in case it schedules power less than 55% of the Contracted Capacity on a monthly basis. Therefore, having agreed to this dispensation in the PPA dated 26.10.2018, the Petitioner cannot claim that it is not liable to pay compensation to the Respondent. Section 74 of The Indian Contract Act is explicit; it reads as” ***when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.***”



Explanation;- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

18. Thus, irrespective of whether any damage is caused or not, if it is stipulated in the agreement, the penalty is required to be paid. Accordingly, the Petitioner is liable to make payment to the Respondent following the methodology prescribed under clause 10.2.3 of the PPA dated 26.10.2018 towards the energy compensation bills for the month of October 2021, including the transmission charges. As PTC has already deducted the amount towards compensation payable for the month of October 2021 from the energy bills for the months of November 2021 and December 2021, the amount payable and deducted may be reconciled by the parties within one month from the date of this order.

19. The issue-I is answered accordingly.

Issue-II: Whether late payment surcharges are to be paid by the Respondent, PTC for delay in payments to the petitioner? And whether the Petitioner is entitled to interest on the outstanding LPS amounts till actual date of payment?

20. The Petitioner has submitted that an issue has arisen between the Petitioner and the Respondent, PTC, about the Late Payment Surcharge (LPS) for the supply of power in the months of June 2019, August 2019, and April 2020. The bills for all three months had been paid by PTC beyond the due date, and the LPS claimed by the Petitioner is as under:

Month	Bill Date	Gross Billed (In Rs.)	Net Recd (In Rs.)	Receipt Date	Due Date	Delay (Days)	Interest (In Rs.)
June'19	01.07.19	20,80,94,234	20,80,94,234	19.08.2019	31.07.2019	19	15,21,939
Aug'19	02.09.19	19,08,56,523	19,08,56,523	01.11.2019	02.10.2019	30	21,88,314
April '20	01.05.20	16,46,72,039	16,46,72,039	01.07.2020	31.05.2020	31	12,93,691
Total Amount (in Rs) : 50,03,944.00							

21. The Petitioner has submitted that it has written several letters and emails to PTC about the above dues. However, PTC has not responded to the same and as per Order in Petition No.182/MP/2022



the petitioner, PTC has requested to revise the above claim from Rs. 50 lakh to Rs. 16.49 lakh leaving some of the invoices.

22. As regards the delayed payment, clause 24.4 of the PPA dated 26.10.2018 provides as under:

“The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 5% (five per cent) above the Bank Rate, and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement including Termination thereof”.

In view of the above, considering the fact that the Respondent, PTC, has delayed the payments for the months of June 2019, August 2019, and April 2020, the Respondent, PTC is liable to pay the corresponding delayed payments (LPS) in terms of clause 24.3 and 24.4 of the PPA dated 26.10.2018. Further, the Respondents have not submitted any document/correspondence on record to show that the LPS invoices claimed by the Petitioner are wrong. In the absence of any such dispute, the liability to pay LPS stands admitted by the Respondents. Further, the Respondent, WBSEDCL has submitted that it had paid the said bill amount to PTC. Accordingly, the Respondent, PTC, shall make the payment to the Petitioner towards the outstanding LPS calculated in terms of the above clause.

23. The Petitioner has prayed to direct PTC to pay the carrying cost on the LPS; the Petitioner has submitted the late payment surcharge of Rs. 50,03,944 will attract further interest / carrying cost. It is relevant to note that this Commission, in the Order dated 9.8.2023 passed in Petition No. 173/MP/2022, has held that the Respondents are liable to pay interest on the outstanding LPS claims to the Petitioner, as under:

“46. We have considered the submissions made by the parties. Admittedly, the LPS claims of the Petitioner pertaining to the period from 21.1.2019 till 10.1.2020 under POs 1 & 2 are yet to be paid by the Respondents, and in the foregoing paragraphs,



we have issued directions to the Respondents to make the payments within a month from the date of this order. Accordingly, the question arises as to whether there can be any direction for awarding interest on the LPS till the date of its actual payment. We notice that a similar issue had come up for consideration before the APTEL in Appeal No. 386 of 2019, titled Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Anr. The said appeal was filed by the appellant, Maharashtra State Electricity Distribution Company Limited (MSEDCL), on being aggrieved by the direction of MERC to pay the penal interest on the outstanding Delayed Payment Surcharge to the wind power generator. The said direction was contested by MSEDCL on various grounds, including that it amounts to interest on interest (double penalty), that the penal levy is against the provisions of the agreement, etc. However, by rejecting such ground, the APTEL, vide judgment dated 20.9.2021, upheld the direction of MERC to levy interest on the Delayed Payment Surcharge. The aforesaid judgment of APTEL was challenged before the Hon'ble Supreme Court by Civil Appeal No.6440 of 2021, wherein the Hon'ble Supreme Court, while vacating the directions given by APTEL (by Para 45) for the financial affairs of MSEDCL to be examined and for appropriate measures to be taken in such regard by the State Commission, disposed of the appeal, declining to interfere with the abovementioned decision on its merits, by order dated 2.3.2022.

47. In view of the aforesaid judgment of the APTEL, which has been upheld by the Hon'ble Supreme Court, the contention of AP Discoms that there cannot be any interest on the outstanding LPS cannot survive. Moreover, as observed by the APTEL in the said judgment, if such contention of AP Discoms is accepted, it would lead to a patently unfair and absurd situation wherein defaulting parties, i.e. AP Discoms in the present case, could simply avoid meeting their undisputed payment commitment towards LPS for the delayed payment of energy charges under the POs and thereafter, not paying the interest thereon despite such dues having remained outstanding for a considerable period (as noted, LPS liability pertains to the period from 21.1.2019 to 10.1.2020), which ultimately compelled the Petitioner to initiate the present legal proceedings for recovery of its legitimate dues. Accordingly, in the facts and circumstances of the present case and balancing the interests of the consumers and the generators, we find it proper to award the interest on the outstanding LPS dues under POs 1 & 2 at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate



as per the PPA, whichever is the lowest. Thus, the Respondents shall also be liable for interest (at the rate specified above) on the outstanding LPS from the 30th day from the date of the respective LPS invoices till the date of the Order. The Petitioner and the Respondents shall reconcile the amount of interest on LPS within 15 days of this Order and thereafter make the payment of the interest within 30 days.

48. In view of our findings, the Respondents, AP Discoms, shall make the payment towards the outstanding LPS along with interest thereon calculated in terms of the above, Further, in case the payments are not made within the timeline specified (15 days for reconciliation and 30 days thereafter) the provision of Late Payment Surcharge in the PPA would kick in.”

24. In view of the foregoing, we deem it fit and proper to award the interest on the outstanding LPS dues at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by an Auditor’s Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the LPS rate as per the PPA, whichever is the lowest.

25. In view of our findings, the Respondents shall make the payment towards the outstanding LPS along with interest thereon calculated in terms of the above. Further, in case the payments are not made within 45 days from the date of issue of the order (15 days for reconciliation and 30 days thereafter), the provision of Late Payment Surcharge as per the PPA would kick in.

26. This issue -II is addressed accordingly.

27. Petition No. 182/MP/2022 is disposed of in terms of the above analysis and discussion.

Sd/-

(Pravas Kumar Singh)
Member

Sd/-

(Arun Goyal)
Member

Sd/-

(Jishnu Barua)
Chairperson

