

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 234/MP/2022

Coram:

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

Date of Order: 5th January, 2024

In the matter of

Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 read with the Pilot Power Supply (PPSA) dated 27.10.2018 executed between the Petitioner and the Respondent No.1/TANGEDCO for supply of 550 MW of power from the power plant of Respondent No.2/IL&FS Tamil Nadu Power Company Limited, seeking (i) payment of the outstanding amount on account of monthly supply bills along with late payment surcharge; (ii) quashing of the termination notice dated 29.3.2022 and (iii) payment of interest on Debt and O&M expenses as determined by this Commission.

And

In the matter of

PTC India Limited,
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi- 110066

....Petitioner

Vs

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

2) IL&FS Tamil Nadu Power Company Limited,
4th Floor, KPR Tower,
Old No. 21, New No.2,
1st Street, Subba Rao Avenue,
College Road- 600 006, Chennai

Parties Present:

Shri Ravi Kishore, Advocate, PTCIL
Shri Keshav Singh, Advocate, PTCIL
Shri Dhruv Tripathi, PTCIL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. Aakanksha Bhola, Advocate, TANGEDCO

Shri Hemant Singh, Advocate, ITPCL
Ms. Ankita Bafna, Advocate, ITPCL
Ms. Sindhuja Rastogi, Advocate, ITPCL

ORDER

The Petitioner (hereinafter as “PTC”), a trading licensee, has filed the present Petition under Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as ‘the Act’) seeking recovery of outstanding dues of Rs.456,29,15,826/- along with the Late Payment Surcharge (in short ‘LPS’) from Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as “TANGEDCO”) on account of procurement of power from the Petitioner through the generating station of Respondent No. 2, IL&FS Tamil Nadu Power Company Limited (hereinafter referred to as “ITPCL”). The Petitioner is also challenging the letter terminating the PPA issued by the Respondent No. 1 and the claim of Rs.428,15,52,000/- made therein as a termination payment. The Petitioner has made the following prayers:

“(a) Allow the present petition;

(b) Direct the Respondent No.1 to immediately pay the principal amount of Rs.456,29,15,826/- plus the applicable late payment surcharge till the date of payment;

(c) Direct the Respondent No.1 to pay 80% of the principal outstanding in the interim;

(d) Set aside and quash the termination notice dated 29.03.2022:

(e) Hold that the penalty /compensation amounting to Rs.243,82,07,926 and the MTOA charges as claimed by Respondent No.1 is not payable;

(f) Direct the Respondent No.1 to make such payment to the Respondent No.2 through the Petitioner as determined by this Commission towards O & M expenses and interest cost as per the provisions of PAPP/PPSA;

(g) Direct the Respondent No.1 not to take any coercive and illegal action in withholding the payment from other ongoing contracts between the Petitioner and Respondent No.1;

Submissions of the Petitioner

2. The Petitioner/ PTC has mainly submitted as under:

(a) The Petitioner had entered into a Pilot Agreement for the Procurement of Power (hereinafter referred to as "PAPP") with Respondent No.2/ITPCL on 26.10.2018 for the generation and supply of 550 MW of power from the generating station of the Respondent No.2/ITCL to Respondent No. 1, TANGEDCO. Subsequently, on 27.10.2018, the Petitioner signed a Pilot Power Supply Agreement (hereinafter referred to as " the PPSA") with TANGEDCO for supply of power from the generating station of Respondent No. 2/ ITPCL. The supply of power was for the period of three years from 1.4.2019 to 31.3.2022 (excluding the months of June, July & August as it is termed as no obligation period).

(b) TANGEDCO having availed of the power supplied by ITPCL through the Petitioner/ PTC has miserably failed to make the payments as per the terms of the PPSA despite various reminders and follow-ups. As per Article 11.5.3 of the PPSA, TANGEDCO is under a contractual obligation to make the payment within 30 days of receipt of the monthly invoice.

(c) There is no provision under which TANGEDCO can withhold the payment in respect of power supplied by IPTCL through PTC. This non-payment of huge outstanding by TANGEDCO has put PTC in a financial constrain on account of which PTC is facing difficulties in meeting its financial obligations towards the generators including ITPCL.

(d) TANGEDCO had also failed to open the Letter of Credit ("LC") in favour of the Petitioner/ PTC as per provisions of the PPSA. Although, TANGEDCO

opened the LC but the same was defective/ discrepant as the encashment of the said LC was subject to the fulfilment of certain conditions/ approvals to be given by TANGEDCO. PTC immediately took the matter with TANGEDCO to rectify the discrepancy/ defect by issuing the unconditional LC but the same was not rectified. Subsequently, on account of non-payment of the outstanding amount, the LC was presented but the same was not honoured by the bank of TANGEDCO on account of the said LC being conditional.

(e) The present transaction is under the Pilot Scheme as notified by the Ministry of Power (MoP), Government of India. In terms of the PAPP/PPSA, the supply of power from the generating station of Respondent No.2/ ITPCL to Respondent No.1, TANGEDCO through the Petitioner/ PTC (being trading licensee) commenced from 1.4.2019.

(f) In terms of Article 12 of the PPSA, TANGEDCO was to provide unconditional, revolving and irrevocable Payment Security Mechanism. However, TANGEDCO opened LC on 29.7.2019, but the same was defective and not as per the provisions of the PPSA. PTC took up the matter regarding deficiencies and short-comings in the LC with TANGEDCO through various communications dated 3.4.2019, 9.9.2019, 15.10.2019, 3.12.2019, 13.07.2020, 25.9.2020, 2.7.2021, 29.7.2021, 1.10.2021 and requested TANGEDCO to amend the LC suitably so that the same is as per the provisions of the PPSA. Despite various requests and reminders by PTC, TANGEDCO failed to amend the LC which was to be provided as per Schedule B of the PPSA.

(g) In term of Article 11.5.3 of the PPSA, TANGEDCO was required to make the payment within 30 days of the receipt of the invoice for the power supplied by PTC.

(h) TANGEDCO, right from beginning of the transaction, failed to make the timely payment in terms of the PPSA. The first monthly bill for power supplied during the month of April 2019 was raised by the Petitioner on Respondent No.1 on 6.5.2019, but the payment from Respondent No.1 for this invoice was received only on 27.9.2019 i.e. after a delay of more than 3 months. The payment for invoices for the months of May 2019 to January 2021 were also received with considerable delay and thereafter no payment has been received in respect of invoices for the moths of February 2021 to September 2021.

(i) TANGEDCO never made payment to PTC on time and as on 30.4.2021, an amount of Rs.494.59 crore was outstanding from TANGEDCO in respect of the invoices for the power supplied up to the month of June 2020.

(j) The last payment from TANGEDCO was received on 30.9.2021 and thereafter, it stopped making payment, and consequently the invoices for power supplied during the months of February 2021 to September 2021 were not paid and are still outstanding.

(k) PTC followed up with TANGEDCO for release of payment vide various letters including letters dated 6.8.2020, 31.8.2020, 27.10.2020, 27.11.2020, 30.4.2021, 27.5.2021, 13.8.2021, 1.9.2021, 1.12.2021, 7.12.2021,

09.12.2021, wherein, the total outstanding as on 30.4.2021 was Rs.494.59 crore.

(l) In view of the huge outstanding, ITCPL vide email dated 3.10.2021 declared zero MW schedule from 4.10.2021, the same was forwarded by PTC to TANGEDCO through email mentioning clearly that PTC/ ITPCL are constrained to initiate this action on account of non-payment of outstanding dues and not providing LC as per the terms of the PPSA. It was clearly informed that any liability arising out of non-scheduling of power to TANGEDCO would be on account of TANGEDCO only.

(m) On account of huge outstanding/dues from TANGEDCO, ITPCL stopped supply of power w.e.f. 4.10.2021. ITPCL informed that consequent to the non-payment of huge overdue, ITPCL shall declare the availability of its generating station but will restrict scheduling power to PTC/ TANGEDCO and continue to claim the tariff as per the order of the Ministry of Power and provisions of PAPP.

(n) In terms of Article 12.2, ITPCL has the right to sell the whole or part of the contracted capacity to any buyer, if it is unable to recover its tariff through the Letter of Credit and if the tariff or part thereof remains unpaid for a period of one month from the payment due date. No communication regarding payment of outstanding amount was received from TANGEDCO.

(o) As per Article 12.3 of the PPSA, in case PTC/ the Aggregator is unable to recover its due through the LC it has a right to sell the power to third parties. Similar provision under Article 12.2 exists in the PAPP. Thus, as per

above the provisions of PPSA/PAPP, PTC/ ITPCL had a right to sell the contracted power to third parties in case the payment in respect of the power already supplied remains outstanding for more than a month. It is an accepted fact that TANGEDCO had miserably failed to make the payment for the power supplied and the amount outstanding more than Rs 450 crore.

(p) TANGEDCO had no intention to settle the outstanding payment, as despite several reminders and follow-up by PTC, there was no response from TANGEDCO with regard to the payment of the outstanding amount.

(q) ITPCL, even though stopped the supply of power with effect from 4.10.2021, continued to declare 100% availability on daily basis. At the end of the month, ITPCL raised the monthly invoices for energy charges corresponding to 55% of the contracted capacity considering it as deemed scheduled. It was submitted that as such PPSA/PAPP does not have any provisions for monthly invoices for deemed scheduled but the Respondent No.2 informed that it had raised these invoices as per the Ministry of Power, Govt. of India Guidelines dated 28.6.2019 & Corrigendum dated 17.7.2019.

(r) ITPCL raised the following monthly invoices based on the deemed schedule for subsequent months, as per details below:

| S. No. | Month of Invoice | Invoice Value (In Rs.) |
|---------------|-------------------------|-------------------------------|
| 1. | October 2021 | 95,42,54,400 |
| 2. | November 2021 | 92,34,72,000 |
| 3. | December 21 | 95,42,54,400 |
| 4. | January, 2021 | 95,42,54,400 |
| 5. | February, 2022 | 86,19,07,200 |
| 6. | March, 2022 | 95,42,54,400 |

The Petitioner raised similar invoices on TANGEDCO till the month of March, 2022 i.e. end of the contract period.

(s) If the Commission is inclined to consider the claim of Respondent No.2 for deemed capacity charges under the Ministry of Power, Govt. of India Guidelines dated 28.6.2019 & Corrigendum dated 17.7.2019, the liability shall be of TANGEDCO.

(t) Surprisingly, on 8.12.2021, a dispute notice was received from TANGEDCO in respect of invoice of October 2021 informing that it has opened a standby LC hence stand of Respondent No.2 for non-suspension of power is not acceptable to Respondent No.1 and levied compensation of Rs.84,41,63,037/- on monthly basis purportedly claiming as per clause 10.2.3 and deduction of MTOA charges for non-supply of power beyond permitted deviation. The letter was forwarded to Respondent No.2.

(u) However, TANGEDCO kept silent on the issue of clearing the outstanding payment in respect of the energy supplied by Respondent No.2 through the Petitioner. Subsequently, on 10.1.2022, Respondent No.1 issued revised dispute notice for the month of October 2021 and revised the compensation amount to Rs.98,52,08,950/- from Rs.84,41,63,037/- and the same was forwarded to Respondent No.2. Further, Respondent No.1 issued dispute notice(s) for the month of period November 2021 to March 2022 wherein Respondent No.1 claimed compensation and MTOA charges for non-supply of power beyond permitted deviation as per clause 10.2.3 of the PPSA, which were forwarded to Respondent No.2.

(v) The dispute notice received from TANGEDCO was nothing but a ploy to avoid its contractual and legal obligations to make the outstanding payments in respect of the power already supplied. The dispute notices received from TANGEDCO were forwarded to ITPCL vide email dated 8.12.2021. However, ITPCL disagreed with the notice vide its letter dated 22.12.2021 informing that the purported levy of Rs. 84.41 crore as penalty by TANGEDCO under its letter dated 8.12.2021 is legally, contractually, and factually unsustainable and patently wrong and erroneous, consequently any action to recover the said penalty from the pending bills will be resisted by us from appropriate court of law and the same has been sent to TANGEDCO on 24.12.2021.

(w) Further ITPCL claimed interest on Debt and O & M expenses, in a petition filed before this Commission and interest cost, etc. as per Article 17.2 of PAPP. Similar provision exists in PPSA under Article 16.2. of the PPSA.

(x) ITPCL sent a letter on 26.5.2022 to PTC claiming compensation amount of Rs.488,63,00,000/- on account of interest payment on debt and O & M expenses. PTC forwarded claim of ITPCL to TANGEDCO. However, no response has been received from TANGEDCO.

(y) A conjoint reading of the provisions of the PAPP & PPSA and fact that the PAPP and PPSA are on back to back basis, any liability on account of any default which is not attributable to the Aggregator and the same is on account of default of the Distribution licensee, has to be borne by the Discom and not the Aggregator. In the instant case, the Aggregator is not under default or there is breach of any provisions of the Agreement. The situation has arisen

solely on account of failure on the part of TANGEDCO to meet its legal and contractual obligation and make the payment as per the provisions of the Agreement.

(z) From the above facts it is established that the non-supply of power to Respondent No.1 from Respondent No.2 is on account of default in payment by Respondent No.1. Hence, claim of Respondent No.1 for alleged compensation/Penalty and MTOA charges on account of shortfall in excess of permitted deviation of 15% is illegal with an intention to avoid its contractual and legal obligations for making payments under the provisions of the Agreement.

(za) No consent was received from Respondent No.1 for presenting the LC despite repeated requests of the Petitioner. In view of the same, the Petitioner, on 4.3.2022, presented the LC to their bankers for payment.

(zb) To the utter surprise of the Petitioner, on 7.3.2022 a communication was received from Respondent No.1 wherein Respondent No.1 issued a notice to initiate action regarding termination of agreement as provided in Clause 17.1.2 of the PPSA. The alleged ground for intent to termination was on account the fact that the Aggregator/generator had failed to achieve monthly availability of 70% for a period of 4 (four) consecutive months as per the provision of Article 17.1.1. It is pertinent to mention that the alleged ground taken by Respondent No.1 for its intent to terminate the PPSA is not tenable under law and facts as the Petitioner/ Respondent No. 2 were constrained to stop the supply of power in view of the huge outstanding of Rs.456,29,15,826/- from Respondent No.1.

(zc) The alleged email from Respondent No.1 to initiate the process of termination was nothing but a ploy to meet its contractual and legal obligations to pay for the power already supplied.

(zd) On 9.3.2022, the Petitioner received the email from the Bankers of Respondent No.1 that they are unable to process the payment under the LC as the 'bill of exchange not accepted by the Applicant' i.e. Respondent No.1 herein. Consequently, the Petitioner on 10.3.2022 requested Respondent No.1 to accept the bill of exchange to enable it to get the payment under the letter of credit.

(ze) However, the bankers of Respondent No.1 did not make the payment as they informed that one of the documents i.e., the accepted Bill of Exchange from the Respondent No. 1, was not attached with the LC. Consequently, on 10.3.2022, the Petitioner sought the acceptance of Bill of Exchange but no response was received from Respondent No.1. From the above fact, wherein the Respondent No-1 didn't give the acceptance of B/E, it is evident that the Respondent No.1 had no intention to pay the outstanding amount for the power already supplied.

(zf) On 29.3.2022, the Respondent No.1 issued the purported termination notice of the PPSA and demanded an alleged termination payment of Rs.428.15 crore calling upon the Petitioner to pay the said amount of Rs.428.15 crore within 10 days.

(zg) It is pertinent to mention that the purported termination notice and termination payment thereof was totally misconceived and not as per the

provisions of the PPSA and PAPP. Further, the purported termination notice was issued two days prior to the Agreement coming to an end. This act on the part of Respondent No.1 shows that it never intended to make the outstanding payment of Rs.456.29 crore along with the LPS for the energy which had already been supplied by Respondent No.2 through the Petitioner. Further, the Respondent No.1 had sold the energy supplied by Respondent No.2 through the Petitioner to its consumer and had received the payment from their consumers.

(zh) With an intention to amicably resolve the matter, a meeting was held between the Petitioner and Respondent No.1 on 28.4.2022 at their office wherein Respondent No.2 was also to join. However, Respondent No. 2 did not join the meeting for the reasons best known to them. No settlement/ resolution was reached between the parties.

(zi) MoP Gazette Notification dated 3.6.2022 formulated a scheme for the discoms to liquidate its outstanding dues as on 3.6.2022.

(zj) The Respondent No.1 vide letter dated 27.6.2022, informed the Petitioner that in view of the MoP Notification it intends to liquidate the outstanding amounting to Rs.316,68,94,992/- in 48 equal monthly instalments. The Respondent No.1 did not give any calculation as to how it has arrived at this figure of Rs. 316,68,94,992/-. Though the total principal outstanding for the energy supplied was Rs. 456,29,15,826/-.

(zk) The Respondent No.1 unequivocally and voluntarily accepted the fact that an amount of Rs 316,68,94,992/ was payable (though no calculation was ever given as to how this amount has been arrived at).

(zl) Most surprisingly, Respondent No.1 vide letter dated 30.6.2022 cancelled the earlier letter dated 27.6.2022 wherein it had unequivocally accepted a payment of Rs.316,68,94,992/-. On the contrary, the Respondent No.1 made an alleged demand of Rs.111,46,57,008/- after adjusting the amount of Rs.428,15,52,000/- towards purported termination payment.

(zm) This act of Respondent No.1 withdrawing the payment liability is totally *malafide* act just to avoid its legal and contractual obligations to make the payment for the power supplied which stood at more than Rs 450 crore plus LPS.

(zn) The discontinuance of supply of power by Respondent No. 2 through the Petitioner was on account of breach of terms of the PPSA by Respondent No.1 in meeting its obligation to make the payment and is as per the terms of the PPSA.

(zo) It is a well settled principle of law that a party having enjoyed the benefit under a contract, in present case the supply of power, is required to make the payment under legal and contractual obligation. It cannot withhold the payment arbitrarily. In view of the huge outstanding, ITPCL was well within its rights to stop supply of power with effect from 4.10.2021. The Respondent No 2/Petitioner had a right to sell the power to third parties in case of non-receipt of payment for more than 30 days.

(zp) The dispute notice dated 8.12.2021 for an alleged compensation is not legal as the supply of power by Respondent No.2 was discontinued on account of non-payment by Respondent No.1. The notice dated 7.3.2022 by

Respondent No.1 to initiate action regarding the termination of Agreement is totally misconceived as the supply of power was stopped on account of failure of Respondent No.1 to make the payment in respect of power supplied by Respondent No.2 through the Petitioner.

(zq) It is a well settled principle of law that a defaulting party cannot take advantage of its own default and seek any compensation. The Respondent No.1 had sold the power to its consumers and has realised the payment. By not making the payment to the Petitioner/Respondent No.2, the Respondent No.1 has indulged in an act of undue enrichment.

3. The Petition was admitted on 3.11.2022 and notice was issued to the Respondents to file their respective replies. Respondent No. 1/ TANGEDCO and Respondent No. 2/ ITPCL have filed reply and the Petitioner has filed rejoinder thereof

4. Respondent No. 1, TANGEDCO, in its reply and written submissions, has mainly submitted as under:

(i) PTC started supply of power to TANGEDCO from 1.4.2019. While there had been some delay on part of the TANGEDCO in payment of invoices, TANGEDCO did make payment against PTC's invoices till January 2021, along with LPS where applicable. All of PTC's dues till the month of January 2021 were paid on 30.9.2021 by TANGEDCO, when an amount of Rs. 259,70,80,787/- was disbursed.

(ii) From 4.10.2021, PTC completely stopped scheduling power to TANGEDCO, despite declaring 100% availability. PTC vits its email dated

3.10.2021 informed TANGEDCO about non-scheduling of power from 4.10.2021 and cited non-liquidation of its outstanding dues and its grievance with the issuance of a purported conditional LC.

(iii) Despite non-scheduling of power from October 2021 to March 2022, PTC continued to raise invoices for deemed energy, purportedly being 55% of the contracted quantum, alleging that the LC issued was not as per agreed terms. TANGEDCO disputed each of these invoices, and iterated that it had opened an LC for an amount equivalent to 1.1 times of the minimum guaranteed offtake under the PPSA, being 55% of the contracted quantum. In any event, PTC has admitted in the Petition that there is no provision under the PPSA, or even the PAPP, which contemplates raising invoices for deemed energy.

(iv) TANGEDCO vide its letters dated 7.1.2022, 31.1.2022, 23.2.2022, and 28.2.2022 requested PTC to resume supply of power, considering that the LC for an amount equivalent to 1.1 times of the minimum guaranteed offtake had already been opened. It was also highlighted that due to PTC's failure to supply power, TANGEDCO was forced to procure power from exchanges and short-term arrangements at high tariffs, with the average tariff being Rs. 7.12 per kWh. TANGEDCO was also paying transmission charges for the entire contracted quantum, out of which only 85% were refundable.

(v) As PTC refused to resume supply despite the above, TANGEDCO was constrained to terminate the PPSA as per Article 17.1.2, which permitted TANGEDCO to terminate the PPSA in the event of aggregator's default one of which was PTC's failure to achieve a monthly availability of 70% for 4

consecutive months [Article 17.1.1(i)]. On 7.3.2022, TANGEDCO accordingly communicated its intention to terminate the PPSA to PTC.

(vi) On 29.3.2022, TANGEDCO issued a termination notice under Article 17.1.2 of the PPSA, highlighting that under the same LC, PTC had been supplying power since 1.4.2019, and as such, by belatedly using the LC an excuse for non-supply of power only from October 2021 was not convincing. Accordingly, the PPSA was terminated and TANGEDCO claimed an amount of Rs.428,15,52,000/- as termination payment under Article 17.3 of the PPSA.

(vii) TANGEDCO had initially, on 27.6.2022, sent a letter to PTC under the provisions of the Ministry of Power (Late Payment Surcharge) Rules, 2022 ("LPSC Rules") intending to liquidate the outstanding dues of PTC amounting to Rs. 316.68 crore (between 1.2.2021 to 30.9.2021) in 48 monthly instalments. However, this letter was promptly cancelled on 30.6.2022, when TANGEDCO adjusted the outstanding dues of PTC, amounting to Rs. 316.69 crore, against the termination payment due to it, consequent to which it was discovered that Rs. 111.46 crore is owed to TANGEDCO.

5. TANGEDCO, in its written submissions 12.2.2023, has submitted as under:

A. *TANGEDCO has always demonstrated its intention to honour its obligations under the PPSA.*

(a) In the three-year term of the PPSA, TANGEDCO has paid a total of Rs. 191,04,630,052/- (before deduction of TDS) to PTC. Admittedly, all invoices for supply of power till January 2021 raised by PTC have been cleared by TANGEDCO. Further, in the event of delay, wherever the LPS was applicable, it has also been paid. At times while there has been some delay in making

payment due to TANGEDCO's financial condition, this delay has not been deliberate, and TANGEDCO has cleared all invoices in periods where there were no disputes between the parties.

(b) Payment against invoices till January 2021 were made on 30.9.2021, and a total amount of Rs. 259,70,80,787/- was remitted. On this date, payment for power supplied during the months of February 2021, March 2021, April 2021, May 2021, and September 2021 were outstanding (the months of June, July and August being no obligation period as agreed by all parties), and TANGEDCO was in the process of arranging funds to clear these dues. However, within 3 days of receipt of the payment of nearly Rs. 260 crore, on 3.10.2021, PTC informed TANGEDCO that ITPCL will no longer be scheduling power because of the purported non-conformity of LC issued with the PPSA, and due to non-liquidation of outstanding dues.

(c) In its letters dated 7.1.2022, 31.1.2022, 23.2.2022, and 28.2.2022 TANGEDCO repeatedly requested PTC to resume supply of power and impressed upon it that LC for the value of 1.1 times of minimum monthly guaranteed off-take valid till 31.3.2022 has been opened. However, despite TANGEDCO's assurances on the LC, PTC failed to resume supply.

(d) During this period, due to non-supply of power, compensation was payable by PTC to TANGEDCO under Article 10.2.3 of the PPSA for deviation from contracted capacity and was further liable to reimburse the amount paid by TANGEDCO towards transmission charges to the extent power was not supplied. Therefore, TANGEDCO did not clear the outstanding dues against the past invoices, considering that after adjustment of compensation due to it under

Article 10.2.3, no amount would have been due to PTC. TANGEDCO apprised PTC of this position through multiple dispute notices between December 2021 to March 2022. PTC did not itself reply to any of these dispute notices, but only forwarded ITPCL's response dated 24.12.2021 to one of the dispute notices.

(e) Even after the PPSA was terminated on 29.3.2022, attempts were made to resolve disputes amicably. Towards this, a meeting was held on 28.4.2022. However, ITPCL refused to participate, and no resolution could be reached.

(f) TANGEDCO's intention to honour its obligations under the PPSA is further apparent from the fact that on 27.6.2022, TANGEDCO sent a letter under the LPSC Rules intending to liquidate the outstanding dues of PTC amounting to Rs. 316.68 crore (between 01.02.2021 to 30.09.2021) in 48 monthly instalments. This letter was cancelled on 30.6.2022, when it was discovered that Rs.111.46 crore is owed to TANGEDCO, after adjustment of termination payment against the outstanding dues of PTC.

B. Non-payment of dues does not allow PTC to stop scheduling of Power

(g) Article 12.2,3 of the PPSA contemplates certain remedies which are available to PTC in the event that it does not receive payment against its invoices. It is clear that in the event that TANGEDCO fails to make timely payment of invoices, PTC can take the certain steps, namely, in the first instance, invoke the LC issued by TANGEDCO without any reference to TANGEDCO, and In the event that PTC is unable to recover its dues through the LC, PTC has the liberty to sell the whole or part of the contracted capacity to any buyer, and appropriate the revenues from such sale towards the dues

owed by TANGEDCO. Thus, it is only in the event of contracted capacity being sold to another buyer that TANGEDCO may be deprived of the said power.

(h) In the present case, instead of resorting to the above remedies, on 3.10.2021 PTC informed TANGEDCO that ITPCL will not schedule power to TANGEDCO from the next day. At this time, PTC had not even attempted to invoke the LC issued by TANGEDCO. Despite ceasing scheduling of power from 5.10.2021 for not clearing invoices between February 2021 to September 2021 (excluding months of June, July, August), it was only on 10.1.2022 that PTC communicated its intention to invoke the LC, invocation of LC was only attempted only in March 2022.

(i) As is apparent from Article 12.3.1 of the PPSA, it is only in the event of inability to recover dues through LC that PTC may sell whole or part of the contracted capacity to another buyer; this is the only event in which PTC may cease supply of power to TANGEDCO. However, even after PTC's purported failure to recover dues from invocation of the LC, and till date, PTC has not shown or even averred that the contracted capacity which was not scheduled to TANGEDCO was sold to another buyer under the provisions of Article 12.3.1 of the PPSA.

(j) ITPCL, in its reply to the present Petition, has also stated in paragraph 7 that "*PTC was at liberty to choose any other Buyer of their choice instead of TANGEDCO, to which the answering Respondent would not have made any objections*". Therefore, there were no impediments to PTC selling the contracted capacity to third party buyers. Therefore, PTC, instead of taking

steps for recovery of its dues as prescribed under the PPSA, stopped scheduling power to TANGEDCO, which is impermissible under the PPSA.

(k) PTC and TANGEDCO, by executing the PPSA, have agreed upon a procedure which allows PTC to recover its outstanding dues from TANGEDCO. In complete derogation of this agreed procedure, PTC ceased scheduling of power to TANGEDCO purportedly because invoices of certain months were not cleared. In this regard, reliance has been placed on the judgment of the Hon`ble Supreme Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd., [(2000) 8 SCC 151 [Para 23]].

(l) PTC's case on this issue appears to be that it was constrained to stop scheduling power to TANGEDCO from 4.10.2021 due to TANGEDCO's outstanding dues. In this regard, it is essential to appreciate that on 30.9.2021, merely 5 days before supply of power was ceased, TANGEDCO released a payment of more than Rs. 259 crore, clearing all invoices raised by PTC till January 2021. Having received this significant amount, PTC cannot be allowed to say that it was unable to supply power due to pending dues. In this regard, reliance has been placed on the judgment in the case of Tata Iron & Steel Company Ltd. v. Ramanlal Kandoi, {MANU/WB/0383/1970 [Para 48 & 49]}.

(m) PTC's action of stopping scheduling of power to TANGEDCO is wholly outside the purview of the PPSA – PTC failed to avail itself of the remedies in the event of non-payment of monthly invoices available under the PPSA. Such action is also opposed to contract law. As stated above, TANGEDCO had disbursed upwards of Rs. 259 crore less than a week before PTC notified

its intention to stop scheduling of power- in such circumstances, non-payment of certain past invoices could not have prevented PTC from supplying power.

C. Non-supply of power for extraneous reasons

(n) PTC and ITPCL did not stop scheduling of power to TANGEDCO due to the non-payment of past invoices, but on account of increase in prices of imported coal, which made operation of ITPCL's power plant more expensive. However, completely without prejudice to the above, even if PTC was constrained to stop scheduling power due to TANGEDCO's actions, it was obligated to take steps to mitigate any loss caused. This position has also been endorsed by the Commission in its order dated 22.4.2013 in Petition No. 137/MP/2011 in the case of NTPC v. WBERC & Ors.

(o) In the present case, Article 12.3.1 of the PPSA itself prescribes sale to another buyer in the event that invoices remain unpaid. It is not PTC's case that the contracted capacity was thus sold; there is further no averment on PTC taking any steps to mitigate the alleged loss caused by TANGEDCO's non-payment of invoices.

D. TANGEDCO had right to terminate the PPSA and claim compensation under Article 17 of the PPSA

(p) The termination of the PPSA by TANGEDCO was wholly due to the breach of obligations on the part of PTC, on account of which TANGEDCO is entitled to damages under Article 17.3 of the PPSA. Under Article 10 of the PPSA, it is the obligation of PTC to make available full contracted capacity to TANGEDCO. Admittedly, this was not done since October 2021. This a ground for termination default under Article 17.1.1(i) of the PPSA.

(q) On the occurrence of such default, TANGEDCO was constrained to terminate the PPSA on 29.3.2022, after giving adequate notice of its intention to do so on 7.3.2022 as per the provisions of Articles 17.1 and 17.3 of the PPSA. PTC did not respond to either of these notices. However, in response to TANGEDCO's notice dated 7.3.2022 communicating its intention to terminate the PPSA, on 19.3.2022 PTC merely forwarded ITPCL's reply dated 10.3.2022, whereby ITPCL had primarily averred that the PPSA and PPAP are independent of each other.

(r) Having validly terminated the PPSA under the provisions of Article 17 due to PTC's default, TANGEDCO, in its termination notice dated 29.3.2022 validly claimed compensation under Article 17.3.2. In the termination notice, TANGEDCO communicated that the PPSA stands terminated under Article 17.1.1(i), and called upon PTC to pay Rs. 428,15,52,000.00 being the amount equivalent to tariff payable for normative availability (85%) for a period of three months. It is essential to appreciate that PTC did not respond to this notice, let alone dispute the amount claimed by TANGEDCO under the provisions of the PPSA.

(s) TANGEDCO was initially willing to liquidate pending dues, amounting to Rs. 316 crore, of PTC under the provisions of the LPSC Rules, as was communicated *vide* letter dated 27.6.2022. However, this letter was recalled, as it was discovered that after adjustment of termination compensation payable to Respondent No. 1 by the Petitioner, an amount of Rs. 111.47 crore was due to Respondent No. 1 from the Petitioner.

(t) TANGEDCO is within its rights to set-off the amounts payable against the termination compensation due from PTC for aggregator default under Article 17 read with Article 9.4 of the PPSA. It is clear that the termination compensation sought by TANGEDCO and set-off against the pending invoices of PTC, is strictly covered by the terms of the PPSA. PTC has alleged that TANGEDCO breached the PPSA on two accounts by not providing LC in the form specified under the PPSA; and by failing to make timely payment of invoices. However, despite the above allegations of breach, PTC chose to continue the PPSA on the basis of the LC issued by TANGEDCO, PTC had been supplying power to TANGEDCO since 1.4.2019 and even after stopping the scheduling of power purportedly due to non-payment of past invoices, PTC continued to raise invoices, and made no indication of any intent to terminate the PPSA.

(u) Even if it is assumed that there has been breach of the PPSA by TANGEDCO, PTC, not having terminated the agreement itself, is now bound by it. In this regard, reliance was placed upon the judgment of the Hon`ble Madras High in the case of Nannier v. N.M. Rayalu Iyer, [1925 SCC OnLine Mad 289]. Thus, TANGEDCO having terminated the contract and claimed compensation strictly under the provisions of the PPSA, PTC cannot now be allowed to challenge it.

6. The Respondent No. 2/ ITPCL, in its reply, has mainly submitted as under:

(a) ITPCL commenced supply of power to PTC with effect from 1.4.2019. Pursuant to the supply of power, ITPCL started raising monthly invoices on PTC in accordance with Article 11.5 of PAPP. However, ITPCL failed to

receive the requisite payment of monthly invoices raised since February, 2021 until March, 2022.

(b) The continuous non-payment of monthly invoices and consequent accumulation of huge outstanding amount of Rs. 446 crore (as on 1.10.2021) including interest along with inappropriate/ conditional payment security mechanism, compelled ITPCL to regulate/ discontinue the supply of power to PTC with effect from 4.10.2021, in line with the MOP Notification dated 28.6.2019 (and Corrigendum dated 17.7.2019). PTC was duly notified by ITPCL in relation to discontinuation of power supply vide letter dated 1.10.2021.

(c) Being aggrieved by the non-payment of the outstanding monthly invoices under PAPP, ITPCL approached the Commission by way of filing a Petition No. 340/MP/2022 for seeking appropriate directions against PTC for making payment of total outstanding dues of Rs. 16,24,02,40,475/- as on 30th April, 2022 comprising of (i) Rs. 4,31,97,75,722/- towards monthly invoices pending since February, 2021 to September, 2021, (ii) Rs. 5,60,23,96,800/- towards charges for minimum guaranteed off-take of 55% against the full availability declared by ITPCL during October, 2021 to March, 2022, (iii) Rs.1,21,85,81,578/- towards delayed payment interest as on 30.4.2022 and (iv) Rs. 21,31,86,375/- towards claim against under-scheduling of power by PTC during May, 2021 and (v) Rs. 4,88,63,00,000/- towards O&M Expenses and Interest on debt for the period February, 2021 to March, 2022. The aforementioned Petition being 340/MP/2022 filed by ITPCL in terms of the

provisions of PAPP executed with PTC, is pending adjudication before this Commission.

(d) As per Regulation 9 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020, PTC is required to make payment to ITPCL irrespective of it receiving or not receiving payment from TANGEDCO. Thus, PTC cannot wriggle out of its obligations to make timely payment to ITPCL. The traders such as PTC collect trading margin from the generators/ buyers in accordance with agreed terms of the contracts.

(e) In the instant case, the trader is charging a trading margin to the tune of five (5.0) paise/kWh in consonance with the PPSA. The payment of the said margin in the instant case is against the obligations of PTC towards ITPCL and PTC can in no way evade its liability when it has realised trading margin in lieu of the same.

(f) After executing the Agreement with ITPCL, PTC identified the Distribution Licensee of Tamil Nadu (TANGEDCO/ Respondent No. 1) as buying utility and allocated the Contracted Capacity of 550 MW to be procured from ITPCL under PAPP, to TANGEDCO. In order to formalize this arrangement, on 27.10.2018, PTC executed PPSA with TANGEDCO for supply of 550 MW procured from ITPCL.

(g) *Since ITPCL was not a party to PPSA*, the said Agreement was shared by PTC with ITPCL on 1.11.2018. The transactions under the PAPP have been crystallised completely on an independent and standalone basis and as such, PTC was at liberty to choose any other Buyer of their choice instead of

TANGEDCO, to which ITPCL would not have made any objections. This establishes that in so far as ITPCL is concerned, the transaction under PAPP does not envisage a back-to-back arrangement.

Re: Supply of Power by ITPCL to PTC from April 2019 to January, 2021

(h) In terms of the PAPP, ITPCL started supplying power to PTC with effect from 1.4.2019. Pursuant to the supply of power, as per Articles 11.5.1 and 11.5.2 of the PAPP, ITPCL raised monthly invoices upon PTC by the 5th day of succeeding month for the supply of power in the previous month and PTC accordingly released the amount for procurement of power from May, 2019 until the month of January, 2020. The payment made by PTC against invoices of April, 2019 and from February, 2020 onwards, were delayed well beyond the due date, in direct contravention of Regulation 9(10) of the Trading Licence Regulations, 2020 and the same were ultimately recovered from PTC and through the Atmanirbhar Scheme of the Government of India.

Re: Conditional Letter of Credit furnished by PTC in violation of the terms of PAPP and the MOP Notification dated 28.6.2019

(i) Meanwhile, on 28.6.2019, the Ministry of Power issued an order (and subsequently a Corrigendum dated 17.7.2019) directing the Distribution Licensees/ Procurers for opening and maintaining of an adequate Payment Security through a Letter of Credit. Consequently, as a payment security mechanism, PTC furnished LCs dated 20.8.2019, 10.10.2019, 31.8.2020, 9.9.2021 and 5.10.2021 in favour of ITPCL.

(j) ITPCL observed certain discrepancies which made the LC conditional and subjected its encashment only upon approval of bill of exchange and

Service Completion Certificate by PTC. Such provisions making the LC conditional, were not in conformity with the Article 12.1 of PAPP read with the Order dated 28.6.2019 (and Corrigendum dated 17.7.2019) issued by the Ministry of Power (MoP) in relation to the Payment Security Mechanism (“MOP Notification”).

(k) These discrepancies were duly brought to the attention of PTC by ITPCL vide several communications issued continuously for more than a year including letters/ emails dated 26.08.2019, 10.11.2019 06.08.2020, 18.09.2020, 05.08.2021, 19.08.2021, etc. In view of these, it was requested to PTC to carry out necessary amendments to make the LC unconditional in terms of PAPP and as per the aforesaid MOP Notification. However, no necessary amendments were made in the existing LC and instead PTC continued to issue the renewed LC with the same discrepancies making the invocation of the instrument conditional upon acceptance of Bill of Exchange and Service Completion Certificate by PTC and thereby made the realisation of dues through payment security mechanism, impossible.

Re: Supply of Power under PAPP during February, 2021 to September, 2021 and non-payment of monthly invoices by PTC

(l) It is a matter of record that ITPCL consistently complied with its obligations as a supplier. However, since February, 2021, no payment to the monthly invoices were made by PTC to ITPCL till date, which was not only contrary to Regulation 9(10) of the Trading Licence Regulations, 2020, but also contrary to Article 11.5.3 of PAPP. The following invoices were raised by ITPCL from February, 2021 to September, 2021 during which no payment was made by PTC in terms of Article 11.5.3:

| Invoice Date | Invoice Period | Invoice No. | Invoice Amount | Payment Due Date | Outstanding |
|--------------|----------------|---------------|----------------|------------------|----------------|
| 01-Mar-21 | Feb-21 | PT/MI/FY21/08 | 86,77,65,750 | 02-Apr-21 | 86,77,65,750 |
| 01-Apr-21 | Mar-21 | PT/MI/FY21/09 | 1,22,94,15,777 | 03-May-21 | 1,22,94,15,777 |
| 03-May-21 | Apr-21 | PT/MI/FY22/01 | 1,01,79,04,195 | 04-Jun-21 | 1,01,79,04,195 |
| 01-Jun-21 | May-21 | PT/MI/FY22/02 | 31,45,44,400 | 03-Jul-21 | 52,77,30,775 |
| 01-Oct-21 | Sep-21 | PT/MI/FY22/03 | 89,01,45,600 | 02-Nov-21 | 89,01,45,600 |

(m) Being aggrieved by the non-payment of outstanding dues of Rs. 638.72 crore as on 6.12.2021, ITPCL, vide communication dated 6.12.2021, intimated PTC that ITPCL, as per the provisions of PAPP, was invoking the LC for liquidation of the outstanding dues and ITPCL sought acceptance on the Bill of Exchange and Service Completion Certificate, but to no avail. No unconditional LC was furnished so as to enable ITPCL to liquidate the outstanding dues.

(n) ITPCL was unable to recover the outstanding amount by invoking the LC issued by PTC since the encashment of the said instrument, as aforementioned, was conditional upon acceptance of Bill of Exchange and issuance of Service Completion Certificate by PTC. Further, PTC failed to carry out requisite amendments to make the LC unconditional in terms of Article 12.1 of PAPP.

(o) Meanwhile, ITPCL vide its letters dated 1.2.2022, 15.2.2022, also approached its banker, Punjab National Bank, to arrange the encashment of LC by the issuing bank i.e., ICICI Bank on account of outstanding dues towards monthly invoices. However, the ICICI Bank vide its communications dated 14.2.2022 and 7.3.2022 to Punjab National Bank, rejected the said request.

Re: Discontinuation of power supply since October, 2021

(p) The continuous non-payment of monthly invoices and consequent accumulation of huge outstanding amount of Rs. 446 crore (as on 1.10.2021) including interest along with inappropriate/ conditional payment security mechanism, compelled ITPCL to restrict supply of power to PTC in line with the MOP Notification. PTC was duly notified by ITPCL in relation to discontinuation of power supply vide letter dated 1.10.2021. Accordingly, ITPCL discontinued the supply of power to PTC under PAPP with effect from 4.10.2021, although ITPCL continued to declare full availability in terms of the Agreement.

(q) Action of discontinuation of supply of power to PTC, was in compliance with the Order dated 28.6.2019 issued by the Ministry of Power whereby the generator shall continue to declare its availability as per the Grid Code and accordingly, raise invoices while Regional Load Despatch Centre (RLDC) shall not schedule power to the Distribution Licensee/ Procurer(s). Pursuant to the said order, ITPCL consistently declared full availability on monthly basis but restricted the scheduling of power to PTC and continued to claim tariff on the basis of minimum guaranteed off-take (i.e., 55% of the Contracted Capacity) as per Articles 10 & 11 of PAPP and MOP Notification, for the months starting from October, 2021 to March, 2022. ITPCL being a *bona-fide* generator, initially restricted itself to approach RLDC under Order dated 28.6.2019 in order to not disrupt the power procurement by TANGEDCO/ PTC from other sources under short-term open access.

(r) Pursuant to continuous insistence of ITPCL to make payment towards outstanding dues, PTC denied making payment on account of failure to

receive payment from TANGEDCO, which was completely contrary to Regulation 9(10) of the Trading Licence Regulations, 2020. It is apparent that the obligation of PTC to make payment to ITPCL emanates from the said Regulations and PAPP, and that any default by TANGEDCO under their respective bilateral agreement i.e., PPSA wherein ITPCL is not a party, shall have no implication on the reciprocal obligations of PTC towards ITPCL under PAPP. Further, a bare perusal of the provisions of the aforesaid Regulations and PAPP suggest that ITPCL independently raises invoices on PTC for supply of power and PTC at its own prudence, scrutinises the same and should make time-bound payments against the said invoices within the period of 32 days. Thereafter, PTC is at liberty to utilize the power so received from ITPCL and independently raise invoices for such transaction. Therefore, any dispute/ non-payment by TANGEDCO shall have no effect on the performance of PTC under PAPP.

(s) For the ease of reference, ITPCL raised the following invoices for the months of October, 2021 to March, 2022 on the basis of minimum guaranteed off-take (i.e., 55% of the Contracted Capacity) as per Articles 10 & 11 of PAPP and MOP Notification:

| Invoice Date | Invoice Period | Invoice No. | Invoice Amount | Payment Due Date | Outstanding |
|---------------------|-----------------------|--------------------|-----------------------|-------------------------|--------------------|
| 02-Nov-21 | Oct-21 | PT/MI/FY22/04 | 95,42,54,400 | 04-Dec-21 | 95,42,54,400 |
| 02-Dec-21 | Nov-21 | PT/MI/FY22/05 | 92,34,72,000 | 03-Jan-22 | 92,34,72,000 |
| 03-Jan-22 | Dec-21 | PT/MI/FY22/06 | 95,42,54,400 | 04-Feb-22 | 95,42,54,400 |
| 03-Feb-22 | Jan-22 | PT/MI/FY22/07 | 95,42,54,400 | 07-Mar-22 | 95,42,54,400 |
| 04-Mar-22 | Feb-22 | PT/MI/FY22/08 | 86,19,07,200 | 05-Apr-22 | 86,19,07,200 |
| 01-Apr-22 | Mar-22 | PT/MI/FY22/09 | 95,42,54,400 | 03-May-22 | 95,42,54,400 |

(t) In view of the non-payment of above monthly invoices outstanding from October, 2021 to March, 2022, by PTC within the payment due date as

stipulated under Article 11.5.3 of PAPP, ITPCL exercised its right to claim interest on delayed payment under Article 24.4 of PAPP on the total outstanding amount and charges for minimum guaranteed off-take of 55% against full deemed availability from October, 2021 to March, 2022 in terms of PAPP read with MOM dated 27.10.2018. ITPCL is also entitled to claim compensation for under-scheduling of power by PTC during the month of May, 2021, in terms of Article 10.2 of PAPP. Accordingly, ITPCL raised following invoices towards Delayed Payment Interest calculated at a rate equal to 5% above Bank Rate and charges for minimum guaranteed off-take of 55% against deemed full availability and at a rate of 15% for compensation against under-scheduling.

(u) ITPCL as a bona-fide supplier, also offered waiver of 50% of Delayed Payment Interest subject to the condition of settlement of full and final monthly invoices.

Re: None of the Invoices were disputed by PTC by issuing Bill Dispute Notices in terms of PAPP

(v) Due to non-payment of the monthly invoices by TANGEDCO and / or PTC, ITPCL stopped supply of power since October, 2021. However, ITPCL continued to raise invoices on PTC for minimum guaranteed off-take of 55% against deemed full availability in terms of the provisions of PPSA. However, PTC has never disputed any of the invoices in terms of the provisions of the PAPP.

(w) As evident from the Bill Dispute Notices purportedly been issued by TANGEDCO to PTC under the PPSA which had subsequently been forwarded by PTC to ITPCL, post discontinuation of power supply in October, 2021,

wherein TANGEDCO not only disputed the monthly invoices issued by PTC but also claimed compensation/ penalty for failure to supply power and declare availability of 85% of Contracted Capacity as per the PPSA. As it appears from the said notices, TANGEDCO also proposed to adjust medium-term open access charges against PTC.

(x) These Bill Dispute Notices as issued by TANGEDCO to PTC had merely been 'forwarded' by PTC to ITPCL without undertaking any independent analysis. ITPCL reiterates that ITPCL being not privy to the transaction between PTC and TANGEDCO, the said bill dispute notices could not have been in any way construed to the prejudice of ITPCL. Thus, ITPCL vide a series of communications has conveyed its stand to PTC and refused to take cognizance of such notices issued by TANGEDCO to PTC under PPSA.

(y) In the event of non-payment against outstanding monthly invoices and non-furnishing of unconditional LC by PTC, ITPCL was justified in suspending power supply as per the order of the Ministry of Power dated 28.6.2019.

(z) For the ease of reference, the following Bill Dispute Notices were issued by TANGEDCO and forwarded by PTC to ITPCL:

| Supply Period | TANGEDCO to PTC | PTC forwarded to ITPCL | Remarks/Details | ITPCLs Reply to PTC |
|---------------|-----------------|------------------------|---|---------------------|
| | Letter Dated | Letter/ Email Dated | | Letter dated |
| Oct-2021 | 8.12.2021 | 15.12.2021 | Oct'21 - Bill Dispute Notice - TANGEDCO Disputed the invoice amount & claimed compensation for availability <85% | 22.12.2021 |
| Nov-21 | 6.1.2022 | 8.1.2022 | Nov'21 - Bill Dispute Notice. TANGEDCO Disputed the invoice amount & Informed that MTOA Transmission charges will be recovered. | 12.1.2022 |

| | | | | |
|--------|-----------|-----------|--|-----------|
| Oct-21 | 10.1.2022 | 13.1.2022 | Oct'21 - Bill Dispute Notice (Revised). TANGEDCO revised the compensation amount & Informed that MTOA charges will be recovered. | 20.1.2022 |
| Dec-21 | 25.1.2022 | 3.2.2022 | Dec'21 - Bill Dispute Notice. TANGEDCO Disputed the invoice amount & Informed that MTOA charges will be recovered. (Only email forwarded, No Letter from PTC) | 4.2.2022 |
| Jan-22 | 10.2.2022 | - | Jan'22 - Bill Dispute Notice. No communication from PTC. ITPCL replied based on TANGEDCO letter copy marked in PTCs letter. TANGEDCO Disputed the invoice amount & Informed that MTOA charges will be recovered. ITPCL Replied based on the email copy marked by TANGEDCO. | 17.2.2022 |
| Feb-22 | 15.3.2022 | 17.3.2022 | Feb'22 - Bill Dispute Notice. TANGEDCO Disputed the invoice amount & claimed compensation for availability <85%. Also, informed that MTOA Transmission charges will be recovered. (Only email forwarded, No Letter from PTC) | 22.3.2022 |
| Mar-22 | 11.4.2022 | 20.4.2022 | March'22 - Bill Dispute Notice. TANGEDCO Disputed the invoice amount & claimed compensation for availability <85%. Also, informed that MTOA charges will be recovered. (Only email forwarded, No Letter from PTC) | 27.4.2022 |

(za) Article 11.6 of PAPP categorically requires the Aggregator/ PTC to notify the Supplier/ ITPCL in relation to the disputed amount of the invoice supported by the particulars, within 10 days of receiving the said invoice. The scheme of the Article stipulates that PTC should independently evaluate the transaction vis-a-vis ITPCL and raise dispute regarding the invoiced amount which should be substantiated by the requisite documents. This was never done by PTC, instead the dispute notices received from TANGEDCO were merely forwarded to ITPCL with delay.

(zb) In pursuance of the receipt of said bill, dispute notices from TANGEDCO, PTC requested ITPCL to resume power supply to PTC under PAPP, despite making no payment towards pending monthly invoices nor furnished any amended/ renewed unconditional LC.

(zc) ITPCL duly responded that being a non-party to PPSA, it was not concerned with the bilateral contractual dispute of the non-payment of outstanding monthly invoices by TANGEDCO to PTC. Further, with respect to the request of PTC for resuming power supply to TANGEDCO through PTC, reference was made to various communications including letter dated 11.03.2022 wherein ITPCL reiterated the issues of non-payment of dues, LC being unconditional, etc.

Re: Termination of PPSA executed between PTC and TANGEDCO

(zd) PTC under the cover of its letter dated 8.3.2022, has 'forwarded' to ITPCL only a Preliminary Termination Notice purportedly been issued by TANGEDCO to PTC on 7.3.2022 indicating therein its intention to terminate the PPSA due to failure of PTC to achieve a monthly availability of 70% for a period of consecutive 4 months. However, ITPCL vide its letter dated 10.3.2022 brought on record its inability to restart the power without receiving any amount towards outstanding dues accumulated since February, 2021.

(ze) Subsequently, in view of the failure of PTC to supply power, on 29.3.2022, TANGEDCO issued a Termination Notice to PTC terminating the PPSA on account of occurrence of alleged Aggregator event of default under the Agreement and imposed Termination Payment of Rs. 428,15,52,000/- which was equivalent to tariff payable for normative availability (85%) for 3 months as per Article 17.3 of PPSA. The said termination notice was forwarded by PTC to ITPCL vide its email dated 4.4.2022. In response, ITPCL vide its letter dated 5.4.2022 replied that the PPSA was an independent agreement executed between PTC and TANGEDCO containing specific set of

terms and conditions binding only the Parties thereto wherein ITPCL was not a party. Hence, the termination of the PPSA shall have no implication on the rights and interest of the parties under PAPP.

(zf) Being aggrieved by the non-receipt of the outstanding payment in terms of the PAPP, on 26.5.2022, ITPCL invoked Article 17.2 of PAPP and issued a Demand Notice to PTC demanding compensation payable for the direct cost incurred and/ or loss suffered by ITPCL as a consequence of the said material breach/ default. In order to support the demand of compensation raised under Article 17.2 of the PAPP vide the said Demand Notice, ITPCL duly enclosed the necessary particulars in the form of invoices raised from February, 2021 to March, 2022 upon PTC and also documents relating to Delayed Payment Interest upto 30.4.2022, interest payable by ITPCL on loan/ debt and Operation & Maintenance expenses, etc.

(zg) In view of the continuous non-payment of the outstanding dues and consequential discontinuation of power supply, a dispute arose between the parties. Consequently, ITPCL approached the Commission vide a Petition being 340/MP/2022 filed by ITPCL in terms of the provisions of PAPP executed with PTC, is pending adjudication before for seeking appropriate directions to PTC to make payment of outstanding dues of Rs. 16,24,02,40,475/- as on 30th April, 2022 comprising of the outstanding payment towards monthly invoices pending since February, 2021 to September, 2021, charges for minimum guaranteed off-take of 55% against the full availability declared by ITPCL during October, 2021 to March, 2022, Delayed Payment Interest as on 30th April, 2022, claim against under-

scheduling of power by PTC during May, 2021 and towards O&M Expenses, and Interest on debt for the period from February, 2021 to March, 2022.

Re: Total outstanding monthly invoices due to PTC under PAPP

(zh) It is a matter of record that ITPCL is aggrieved on account of non-receiving of the payment towards monthly invoices raised under PAPP since February, 2021. As per the terms of the PAPP, ITPCL is liable to receive payment of Rs. 16,24,02,40,475/- comprising of Rs. 4,31,97,75,722 towards monthly invoices pending since February, 2021 to September, 2021; Rs.5,60,23,96,800/- towards charges for minimum off-take of 55% against deemed full availability declared by ITPCL during October, 2021 to March, 2022; Rs.1,21,85,81,578 towards Delayed Payment Interest till 30.04.2022 and Rs. 21,31,86,375 towards compensation for under-scheduling of power by PTC; Rs.4,88,63,00,000 towards O&M Expenses and Interest on debt for the period February, 2021 to March, 2022.

(zi) Considering the submissions made above, ITPCL being neither privy/party to the PPSA, which is a completely independent contract between PTC and TANGEDCO, nor bound by the terms thereof, ought not to be affected by the outcome of the underlying dispute in the present Petition. The rights, entitlements and obligations of ITPCL is only from or against PTC and the same is governed exclusively by the terms of PAPP.

7. The Petitioner, in Written submissions dated 14.4.2023, has reiterated the submissions made in the Petition. Therefore, the same is not repeated here for the sake of brevity.

Analysis and Decision

8. We have considered the submissions made by the parties and the documents made available on record. Based on this, the following issues arise for our consideration:

Issue No. 1: Whether the Petitioner, PTC is entitled to an outstanding principal amount in respect of the Monthly Invoices for the period 1.20.2021 to 30.9.2021 along with late payment surcharge thereon?

Issue No. 2: Whether the Termination Notice dated 29.3.2022 issued by the Respondent No.1, TANGEDCO upon the Petitioner, PTC is valid?

Issue No. 3: Whether the action of stoppage of supply by the Petitioner to the Respondent No.1 w.e.f. 4.10.2021 is sustainable?

Issue No. 4: Whether any direction is required, at this stage, upon the Respondent No.1 to make such payment to the Respondent No.2 through the Petitioner towards O & M expenses and interest cost as per the provisions of the PAPP/PPSA?

Keeping in view that issues 1,2 and 3 are interlinked, we will be dealing with these issues together.

9. We have considered the rival contentions of the parties and gone through the documents placed on the record. The Petitioner has submitted that the Respondent No.1 has failed to make the payment in respect of the Monthly Invoices for the period from February, 2021 to September, 2021 (barring the months of June, July and August- which have been agreed to as “No Obligation Period” by all parties) and the total outstanding principal amount due is Rs. 456.29 crore. The Petitioner has also submitted that as per Article 23.4 of the PPSA, in the event the Respondent No.1 fails to make payment with the Payment Due Date (30th days from receipt of Monthly Invoice), the Petitioner is entitled to delayed payment interest as indicated in the said Article. Indisputably, Article 11.5.3 of the PPSA requires Utilities, i.e. TANGEDCO in this case to make payment of the amount claimed under the Monthly Invoice within 30 days for a receipt, except any amount which it determined as not payable or

disputed amount. Moreover, as per Article 23.4 of the PPSA, in the event of delay beyond such period, the defaulting party is liable to pay interest for the period of delay calculated at a rate equal to 5% above the Bank Rate. Both the aforesaid Articles are quoted hereunder:

“Article 11.5 Billing and Payment

.....
11.5.3 The Utilities shall, within 30 (thirty) days of receipt of a Monthly Invoice in accordance with Clause 11.5.1 (the “Payment Due Date”), make payment of the amount claimed directly, through electronic transfer, to the nominated bank account of the Aggregator, save and except any amounts which it determines as not payable or disputed (the “Disputed Amounts”).....”

“Article 23.4 Delayed Payments

The parties hereto agree that payment due from one party to the other party under the provision 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 percent) 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 aforesaid specific provisions, there cannot be any dispute with regard to the entitlement of the Petitioner towards the payment dues under the Monthly Invoices for the months of February to May, 2021 and September, 2021 and the interest thereon in the event of delayed payments of such invoices. We notice that the Respondent No. 1 has as such not opposed its liability of payment of the Monthly Invoices for the aforesaid period and in fact, by its letter dated 27.6.2022, the Respondent had itself admitted the outstanding dues of the Petitioner as on 3.6.2022 as Rs. 316.68 crore, (which comprised of Rs. 458.80 crore for the Monthly Bills of February to September, 2021, Rs. 129.45 crore towards LPS and adjustment towards penalty/compensation due to non-supply for the months of October, 2021, February, 2021 and March, 2021 and PoC/Open Access charges for an amount of Rs.270.90 crore) indicating its intention to liquidate the same under the LPS Rules in

48 equal monthly instalments. Subsequently, Respondent No.1, however, withdrew its letter on account of the termination of the PPSA and the termination payment payable by the Petitioner to the tune of Rs.428.15 crore and as a result of this, the Respondent has raised a counter-claim of balance Rs.111.46 crore upon the Petitioner, after making the adjustment against the amount due and payable by it as determined at Rs. 316.68 crore as noted above.

10. In light of the above, the Petitioner is entitled towards the payment dues under the Monthly Invoices for the months of February to May, 2021 and September, 2021 and the interest thereon in the event of delayed payments of such invoices in terms of the PPSA.

11. This brings us to the second and third issues as noted above. Prior to dealing with the issue of validity of the Respondent No.1's Termination Notice dated 29.3.2022 and the consequent claim of the Termination Payment of Rs. 428.15 crore, it would be pertinent to refer to the relevant provisions of the PPSA, under which the above action has been initiated by TANGEDCO:

**“ARTICLE 17
TERMINATION**

17.1 Termination for Aggregator Default

17.1.1 Subject to the Applicable Laws and save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Aggregator fails to cure the default within Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 90 (ninety) days, the Aggregator shall be deemed to be in default of this Agreement (the “Aggregator Default”), unless the default has occurred as a result of any breach of this Agreement by the Utility or due to Force Majeure. The defaults referred to herein shall include the following:

.....

- (i) the Aggregator fails to achieve a monthly Availability of 70% (seventy per cent) for a period of 4 (four) consecutive months or for a cumulative period of 4 (four) months within any continuous period of 12 (twelve) months, save and except to the extent of Non-Availability caused by (i) a Force Majeure Event, (ii) an act or omission of the Utility, not occurring due to any default of*

the Aggregator or (iii) shortage of Fuel occurring for reasons not attributable to the Aggregator;”

“17.3 Termination Payment

17.3.2 Upon Termination on account of a Aggregator Default, the Aggregator shall to the Utility, by way of Termination payment, an amount equal to the Tariff that would have been due and payable for Normative Availability for a period of 3 (three) months as if the Contracted Capacity was Available for such 3 (three) months from the date of Termination.

17.3.3 Termination Payment shall be due and payable within 15 (fifteen) days of a demand being made with the necessary particulars, and in the event of any delay, the defaulting Party shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days.....”

12. Admittedly, the Termination Notice has been issued by the Respondent No.1 by relying upon the ground/default provided in Clause 17.1.1(i), which enables the utility to proceed to terminate the PPSA if the Aggregator fails to achieve a monthly Availability of 70% for a period of four consecutive months or for a cumulative period of four months within any continuous period of 12 months, save and except to the extent of the non-availability is caused by (i) a force majeure event, or (ii) an act or omission of the Utility not occurring due to any default of the Aggregator, or (iii) shortage of fuel occurring for reasons not attributable to the Aggregator. It is also not in dispute that the Respondent No.2/Supplier and the Petitioner herein had stopped supplying power to the Respondent No.1 under the PPSA w.e.f 4.10.2021 till March, 2022 (although continued to declare 100% availability on a daily basis) citing the huge outstanding amount & inappropriate payment security mechanism and have relied upon the provisions of the PPAP & PPSA and the Order of the Ministry of Power dated 28.6.2019 read with Corrigendum dated 17.7.2019 in support thereof. While the aspect of such stoppage of supply being valid or not, has been dealt with in the later part of this order, at this junction we may examine the validity of the Respondent No.1's Termination Notice dated 29.3.2022.

13. It is pertinent to note that under Article 17.1.1 of the PPSA, the Aggregator shall be deemed to be in default of the Agreement in the event any of the defaults specified therein including the default specified at Clause (i) have occurred and have not been cured within the Cure Period. However, there are exceptions to the above and in the event of the default by Aggregator has occurred as a result of any breach of the Agreement by Utility or due to a Force Majeure event, the said Article does not trigger. Moreover, we further notice that under Clause (i) also, if the failure on the part of the Aggregator to achieve the Availability norms specified therein is on account of (i) Force Majeure event, (ii) an act or omission of the Utility not occurring due to any default of the Aggregator, or (iii) shortage of fuel occurring for reasons not attributable to Aggregator, the said clause cannot be triggered. In this context, it is imperative for us to examine whether the non-supply of power by the Respondent No.2 and/or the Petitioner herein to the Respondent No.1 and consequent failure to achieve the Availability norms as specified in Clause (i) of the Article 17.1.1 can be attributed to any breach of the Agreement by Respondent No.1 or any act or omission of it not occurring due to the default of the Aggregator.

14. Perusal of the various articles of the PPSA reveals that under Article 6.1.1 of the PPSA, the Utility was, at its own cost and expenses, required to undertake, comply with and perform all its obligations set-out in this Agreement. Moreover, under Article 6.1.2 (b) of the PPSA, the Utility was under obligation not to do or omit to do any act, deed or thing which may in many manners be violative of the provisions of the PPSA. Both the above Articles are quoted hereunder:

“6.1 Obligations of Utility

6.1.1 The Utility shall, at its own cost and expense undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.

6.1.2 The Utility agrees to provide support to the Aggregator and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:

(b) not do or omit to do any act, deed or thing which may in any manner be violative of any of the provisions of this Agreement. ...”

15. Undeniably, inasmuch as the Petitioner herein was required to make available to the Contracted Capacity under the PPSA to the Respondent No.1 herein, the Respondent No.1 was under equal obligation to make the payment of the tariff as agreed upon in the PPSA with the Payment Due Date. However, it is not disputed position that the Respondent No.1 had been consistently delaying the payment of the tariff against the Monthly Invoices raised by the Petitioner. As has been indicated, right from the supply of power under the PPSA, the Respondent No.1 has been delaying the payment against the invoices. The very first Monthly Invoice for the supply of power during the month of April, 2019 as raised by the Petitioner on 6.5.2019 was paid by the Respondent No.1 only on 27.9.2021. Thereafter also, there had been considerable delay in the making the payment against the Monthly Invoices for May, 2019 to January, 2021. As has stated by the Respondent No.1 itself, the outstanding payments upto the period of January, 2021 amounting to approximately Rs. 260 crore were cleared by the Respondent No.1 only on 30.9.2021 and in the meantime, another substantial sum of Rs. 456.29 crore had become due for the months of February to May, 2021 and September, 2021. Despite the repeated requests by the Petitioner to clear the aforesaid outstanding amounts right upto the stoppage of supply of power w.e.f 4.10.2021, no action was taken by Respondent No.1 to liquidate such arrears. While the PPSA had the provisions for Payment Security Mechanism to ensure that such eventualities can be avoided, the

action & conduct of the Respondent No.1 in providing the Payment Security Mechanism is also noteworthy in order to address the issue at hand.

16. Under Article 12.1 of the PPSA, the Utility i.e. Respondent No.1, TANGEDCO herein was required to provide the Aggregator, not later than 30 days prior to the likely date of Appointed Date, an unconditional, revolving and irrevocable Letter of Credit for an amount equivalent to 1.1 times of estimated Monthly Invoice computed at minimum guaranteed off-take, which may be drawn by the Aggregator for recovery of payment due against the Monthly Invoice in accordance with the provisions of the Agreement. Also, the Schedule B to the PPSA already provided a specific form for such LC and the Utility was required to provide LC substantially in the same form as provided in the Schedule B. The relevant extract of the Article 12.1.1 of the PPSA reads as under:

“12.1 Letter of Credit

12.1.1 The Utility shall, no later than 30 (thirty) days prior to the likely date of the Appointed Date, provide to the Aggregator, an unconditional, revolving and irrevocable letter of credit for an amount equivalent to the 1.1 times of estimated Monthly Invoice computed at minimum guaranteed off-take (the “Letter of Credit”), which may be drawn upon by the Aggregator for recovery of payment due against the Monthly Invoice in accordance with the provisions of this Agreement. The Letter of Credit shall be substantially in the form specified in the Schedule – B and shall come into effect on the Appointed Date and shall be modified once every year to reflect the revision in 1.1 times of estimated Monthly Invoice computed at Minimum guaranteed off-take in accordance with the provisions of this Agreement.”

17. Further, as per Article 12.2.3, the Aggregator, at its discretion, was entitled to invoke the LC for recovery of the amount due & payable in the event Utility fails to pay Monthly Invoice before the 27th day of month in which the Payment Due Date occurs without any reference to the Utility and upon furnishing certain documents viz. (i) a copy of Monthly Invoice which has remained unpaid, and (ii) a certificate from the Aggregator to the effect that the Monthly Invoice is in accordance with the

Agreement and that the amount due and payable has remained unpaid. The relevant extract of the said Article reads as under:

“12.2.3. In the event of Utility’s failure to pay the Monthly Invoice before the 27th (twenty seventh) day of the month in which the relevant Payment Due Date occurs, the Aggregator may, in its discretion, invoke the Letter of Credit for recovery of the amount due, without any reference to the Utility, pay the amount due upon the Aggregator presenting the following documents, namely:

- (a) a copy of the Monthly Invoice which has remained unpaid; and*
- (b) a certificate from the Aggregator to the effect that the Monthly Invoice is in accordance with this Agreement and that the amount due and payable has remained unpaid.”*

Thus, as per the above provisions, the Respondent No.1, TANGEDCO was essentially required to provide an unconditional LC in the favour of the Petitioner and the Petitioner, at its discretion, was at liberty to draw upon such LC in the event of dues under the Monthly Invoice having remained unpaid beyond the stipulated period, without any reference to TANGEDCO by presenting only (i) a copy of Monthly Invoice which remained unpaid, and (ii) a self-certificate to the effect that the Monthly Invoice is as per the Agreement and the amount due & payable has remained unpaid. In the present case, however, LC provided by the Respondent No.1 was not an unconditional one and imposed an additional requirement for its invocation viz. Bill of Exchange or Draft accepted by TANGEDCO. As a result, the LC ceased to be an unconditional and could not have been invoked without the intervention/reference of the Respondent No.1, which is in stark contrast with the true intent & purpose of the aforesaid Articles and payment security mechanism. This is evinced by the fact when the Petitioner approached the Banker with invocation request on 4.3.2022, the Banker by its email dated 9.3.2022 intimated that it was unable to process the payment under LC as the “Bill of Exchange” was not accepted by the Respondent No.1. The Respondent No.1 has neither disputed the fact of such condition having

been incorporated in the LC nor has contended that such incorporation did not make LC a conditional one and could have been encashed by the Petitioner without its intervention. The defence put forth by the Respondent No.1 are two folds, namely, (i) such condition was incorporated in the LC from the very beginning and the Petitioner has chosen to supply the power under the PPSA, it amounted to a waiver of its rights to contest such incorporation, (ii) the Petitioner sought to invoke the LC for the first time only in March, 2022 and no prior point in time. While the second ground put forth by TANGEDCO is more relevant in the context of stoppage of supply of power w.e.f. 4.10.2021 and consequently, has been examined in the later part of this order, at this juncture, we may deal with the argument that by supplying the power under the PPSA, the Petitioner has waived its right to contest the form of LC. It is true that as per the provisions of the PPSA, the Petitioner, after providing the Performance Security to Utility, was entitled by notice to require the Respondent No.1 to satisfy any or all the Conditions Precedent set forth in Article 4.1.2 including issuance of the LC in accordance with the Agreement and the Respondent No.1 was under an obligation to provide the Petitioner an unconditional, revolving and irrevocable LC not later than 30 days prior to the likely date of the Appointed Date. It is equally true that as per the provisions of the PPSA, the Petitioner was entitled to damages for the delays by the Utility in the event it does not procure fulfilment or waiver or any or all the Conditions Precedent as set forth in Article 4.1.2 and the said delay has not occurred as a result of a breach by the Aggregator or a Force Majeure event and consequently, Article 4.4 also gives rise to Deemed Termination of the PPSA by mutual agreement between the parties after expiry of the extended period. It is also not in dispute that though the power under the PPSA commenced from the 1.4.2019, LC came to be provided by the Respondent No.1 to the Petitioner only on 29.7.2019

and the Petitioner had as such did not raise any claim of damages for delays at the end of Utility i.e. TANGEDCO. However, it has to be taken note that the Petitioner had been taking up the issue of LC with the Respondent No.1 right from the very beginning. The Petitioner vide its letter dated 3.4.2019 had requested the Respondent No.1 to provide an unconditional, revolving and irrevocable LC as per the Article 12.1 of the PPSA on an urgent basis. Subsequently, after Respondent No.1 provided the LC only on 29.7.2019, the Petitioner continuously wrote to the Respondent No.1 by its letters dated 4.9.2019, 9.9.2019, 15.10.2019, 3.12.2019, 13.7.2020, 25.9.2020, 2.7.2021, 29.7.2021 and 1.10.2021 pointing out the various discrepancies in the LC including the “requirement of Bill of Exchange or Draft accepted by TANGEDCO”, which made the said LC a conditional and requesting to suitably amend the provisions of LC. Pertinently, the said letters not only pertained to the original LC provided by the Respondent No. 1 on 29.7.2019 but also to the subsequent modified/renewed LCs as required to be provided by TANGEDCO at every year. Hence, if we were to accept the contention of TANGEDCO that the Petitioner did not object to the incorporation of the aforesaid condition in the LC as provided by it on 29.7.2019, we are unable to agree with the contention of TANGEDCO that for the subsequent period also, the Petitioner could not have insisted upon the removal of such condition/deficiency or for that matter deemed to have waived its right to this extent. In any case, it is noticed that the Article 23.5 of the PPSA provides as under:

“23.5 Waiver

23.5.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under this Agreement:

(a) shall not operate or be construed as a waiver of any other or subsequent default hereof or of other provisions of or obligations under this Agreement;

(b) shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and

(c) shall not affect the validity or enforceability of this Agreement in any manner.

23.5.2. Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement or any other obligations thereunder nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as a waiver of such breach or acceptance of any variation or the relinquishment of any such right hereunder.”

Thus, the provisions of the PPSA clearly provide that a waiver, including a partial or conditional waiver by either Party of any default by the other Party in observations and performance of any provisions or obligation shall not operate or be construed as a waiver of any other or subsequent default and that failure by either party to insist on any occasion upon the performance of terms, conditions and provisions of the Agreement or any obligations thereunder nor the time or other indulgence granted by such a Party to the other shall be treated or deemed as a waiver of such breach or acceptance of any variation or the relinquishment of any such right under the PPSA. Hence, in view of the aforesaid categorical provisions of the PPSA, the contention of TANGEDCO that the Petitioner having accepted the conditional LC and having started supplying the power under the PPSA has waived its right to impugn the LC at this stage does not weigh with us and deserves to be rejected.

18. Thus, even assuming that the failure of the Petitioner to achieve the monthly Availability norms as stipulated in Article 17.1.1(i), invoking which the Termination Notice has been issued by TANGEDCO, amounts to default on the part of the Aggregator, such default in our view is directly linked to the breach on the part of Respondent No.1 in non-payment of the Monthly Invoices of substantial amount of Rs. 456.29 crore coupled with the furnishing of conditional LC, against the clear requirement of providing unconditional LC, which further rendered the Petitioner

remediless to realise its outstanding dues. Hence, in view of the above, the Termination Notice dated 29.3.2022, on the premise of default on the part of the Petitioner in terms of Article 17.1.1(i) of the PPSA, deserves to be set aside and consequently, the demand of the Respondent No.1 towards the Termination Payment under Article 17.3, upon the Petitioner also fails.

19. This brings us to the next counter-claim of the Respondent No.1, TANGEDCO towards the penalty/compensation amounting to Rs. 243.82 crore along with applicable MTOA charges as per Article 10.2.3 of the PPSA, which is linked to the issue No. (c) as framed above i.e. whether the action of stoppage of the supply of power by the Petitioner to Respondent No.1 w.e.f. 4.10.2021 is sustainable?

20. Indisputably, as per Article 10.2.3 of the PPSA, in case of deviation in declared availability from the Aggregator side is more than 15% of the Contracted Capacity for which open access has been approved, then Aggregator shall pay the Utility a compensation on monthly basis at the rate which shall be the difference between the Tariff payable by the Utility and Daily Average MCP price at the Power Exchange for such date, for the quantum of shortfall in excess of permitted deviation of 15% and further, the Aggregator shall also be liable to pay the applicable transmission charges to the extent not supplied to Utility for the quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA. The relevant extract of the said Article reads as under:

“10.2.3 In case of deviation in declared Availability from the Aggregator side is more than 15% of the Contracted Capacity for which open access has been approved, then the Aggregator shall pay to Utility a compensation on monthly basis at the rate, which shall be the difference between the Tariff payable by the Utility 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 Aggregator shall also pay the applicable transmission charges to the extent not supplied to the Utility, for quantum of shortfall in excess of permitted deviation of 15% of the approved MTOA....”

Thus, as per the above clause, there cannot be any dispute to the liability of the Aggregator to pay the compensation at the rate stipulated therein in the event of deviation in Declared Availability from its side is more than 15% of the Contracted Capacity for which the open access has been approved for. However, it is noticed that the said clause gets triggered only when there is a deviation in the declared Availability and as stated by the Petitioner and they had continued to declared 100% availability qua Respondent No.1, TANGEDCO. Moreover, on this basis, they have also raised invoices upon the Respondent No.1 for deemed energy, being 55% of the contracted quantum. The Petitioner and Respondent No.2 have essentially stated that the such stoppage of supply of power was in accordance with the provisions of the Agreements read with Ministry of Power's Order dated 28.6.2019 read with corrigendum dated 17.7.2019. *Per contra*, Respondent No.1 has strongly opposed the action of the Petitioner/Respondent No.2 in stoppage of supply under the Agreements. TANGEDCO has submitted that the provisions of PPSA do not provide any right to the Petitioner for stoppage of supply except as per Article 12.3 which gets triggered in the event the Aggregator is unable to recover its tariff through LC and if the tariff or part thereof remains unpaid for a period of 1 month from the Payment Due Date. TANGEDCO has submitted that the Petitioner herein chose to invoke the LC for the very first time only in the month of April, 2022 that is much after the stoppage of supply w.e.f. October, 2021 and hence, its right to sell the whole or part of the Contracted Capacity to any buyer for recovery of payment dues from the Utility could not have been triggered prior to the date of invocation of LC by the Petitioner. TANGEDCO has further submitted that as per said Article, the Petitioner could have diverted the Contracted Capacity only in case such capacity being sold to

a third party. However, in the present case, no such details of any third party sale or revenue earned thereof have been furnished by the Petitioner. TANGEDCO has also contended that non-supply under the agreement by Respondent No.2 PTC was not on account of outstanding dues/conditional LC as alleged but due to extraneous factors including the increase in the price of imported coal. TANGEDCO has also stated that the declaration of Availability while restricting the scheduling of power to it was nothing but an eyewash as no power was actually offered and scheduled for supply to TANGEDCO.

21. We have considered the submissions of the parties. At the outset, we take a note of the fact that the invoices raised by Respondent No.2 upon the Petitioner and consequently, by the Petitioner upon Respondent No.1, TANGEDCO towards deemed scheduled energy (55%) are not the subject matter of the prayers made by the Petitioner in the present case. In fact, they form part of the Respondent No.2's prayers as made in Petition No. 340/MP/2022, which is currently pending for adjudication before the Commission, and hence, contentions of the parties in relation thereto, are not dealt with in the present Petition and will be considered while adjudicating the Petition No. 340/MP/2022. We may also note that the stoppage of supply w.e.f. 4.10.2021 was at the end of Respondent No.2 under the PPAP and not from Petitioner's end under the PPSA. However, as already noted above, various contentions of Respondent No.1 qua the Petitioner herein regarding the breach of the obligations under the PPAP are the subject matter of Petition No. 340/MP/2022, which will be dealt with while dealing with the said case, and in the present case, we are primarily concerned with the breach of its various obligations by Respondent No.1 under the PPSA as alleged by the Petitioner herein.

22. Now, in order to address issue as to whether the action of stoppage of supply to the Respondent No.1 w.e.f. 4.10.2021 is sustainable in terms of the provisions of the PPSA and the Ministry of Power's order dated 28.6.2019 read with corrigendum dated 17.7.2019, we may first refer to the provisions of the PPSA, in particular, Article 12.3 of the PPSA:

"12.3 Recovery from Sale of Contracted Capacity

12.3.1 In the event the Aggregator is unable to recover its Tariff through the Letter of Credit and if the Tariff or part thereof remains unpaid for a period of 1 (one) month from the Payment Due Date, then notwithstanding anything to the contrary contained in this Agreement, the Aggregator shall have the right to sell the whole or part of the Contracted Capacity to any Buyer for recovery of its payment dues from the Utility. For the avoidance of doubt, the Parties expressly agree that the Aggregator shall be entitled to appropriate the revenues from the sale hereunder for recovering the Tariff due and payable to it for sake of such Contracted Capacity to the Utility and the surplus remaining, if any, shall be appropriated for recovery of its dues from the Utility.

12.3.2 The sale of Contracted Capacity pursuant to the Clause 12.3.1 shall not extinguish any liability of the Utility or any claim that the Aggregator may have against the Utility, save and except to the extent of amounts recovered under the provisions of Clause 12.3.1.

12.3.3 Supply of electricity to the Utility in accordance with the provisions of this Agreement shall be restored not later than 7 (seven) days from the day on which the Utility pays, or is deemed to have paid, the arrears due to the Aggregator in accordance with the provisions of this Agreement, renews the Letter of Credit."

23. Although from bare reading of Article 12.3.1 gives an indication that the Aggregator shall have the right to sell the whole or part of the Contracted Capacity to any Buyer from recovery of its payment due from the Utility in the event the Aggregator is unable to recover its tariff through LC and if such tariff or part thereof remains unpaid for a period of 1 month from the Payment Due Date. While there cannot be any dispute that the monthly invoices beginning from the month of February, 2021 have remained unpaid for much more than one month from the Payment Due Date, the former condition that is Aggregator is unable to recover its Tariff through LC has to be given a purposive interpretation in the present case. As

already noted above, the PPSA provides for an unconditional LC and consequently, unbridled discretion upon the Aggregator to draw upon such LC in the event of dues remaining outstanding for a specified period under Article 12.2.3. However, in the present case, LC furnished by Respondent No.1, was a conditional one and in order to invoke or encash such LC, the Petitioner was required to have Bill of Exchange or Draft as duly accepted by TANGEDCO itself. This aspect was repeatedly brought to the notice of the Respondent No.1 for taking necessary action and removal of such condition. However, the Respondent No.1 neither paid any heed to such requests nor was the case that the Respondent No.1 was duly making the regular payment of Monthly Invoices thereby the Petitioner did not have any need to resort to LC. The perversity of the conduct of Respondent No.1 is evinced from the fact that when the Petitioner wrote to Respondent No.1 on 10.3.2021 (i.e. couple of days after the Respondent No.1 having issued an intention to issue Termination Notice on 7.3.2021) to provide accepted Bill of Exchange or Draft, enabling the Petitioner draw upon the LC to recover the past dues, the Respondent No.1 even failed to reply. In our view, Respondent No.1 having itself flagrantly violated the provisions of the PPSA, cannot seek to apply such provisions qua the Petitioner herein to its own advantage. It is well settled that a party cannot take advantage of its own wrong. Having itself furnished a conditional LC, which it failed to rectify despite numerous requests, and subsequently having also refused to provide the requisite document to enable the Petitioner to invoke the LC, the Respondent No.1 cannot insist upon the Petitioner that it ought to have invoked the LC prior to exercising its right to third party sale under Article 12.3.1. Respondent No. 1 has also argued that under the said Article, the Petitioner can deny the contracted capacity only in case there is a third-party sale of such capacity to any buyer and not otherwise. However, we are

not in agreement with such contention of the Respondent No.1. The fructification of the third-party sale of contracted capacity to any buyer depends upon the market conditions and numerous other factors including commercial viability of such sale. If the contention of Respondent No.1 is to be accepted, it would lead to a situation that in the event where the Petitioner does not find any buyer in the market, then it would be under compulsion to continue to supply to a defaulting Utility, which has failed to clear its dues which does nothing but further aggravates the financial position of the Petitioner. It is pertinent to note that under the said Article, the Petitioner has a right to divert the whole or part of the contracted capacity. It is also pertinent to note that as per Article 12.3.3 of the PPSA, the supply to Utility in accordance with the PPSA is to be restored not later than 7 days from the day on which the Utility pays or is deemed to have paid, the arrears due to the Aggregator in accordance with the Agreement, renews the LC. However, in the present case, none of the aforesaid eventuality came to be fulfilled requiring the Petitioner to restore the supply under the PPSA. Therefore, in the particular facts & circumstances of the present case, we find that the stoppage of supply by the Petitioner to the Respondent No.1 under the PPSA, w.e.f. 4.10.2021, was in accordance with the provisions of the Article 12.3 of the PPSA.

24. Although the Petitioner has also relied upon the Ministry of Power' Order dated 28.6.2019 read with Corrigendum dated 17.7.2019 to support the action of stoppage of supply to the Respondent No.1 herein, keeping in view that we have found the such action in accordance with the provisions of the PPSA itself, we do not find any need to examine the said aspect in the context of the Ministry's aforesaid order.

25. In view of the foregoing observations, we hold that the action of the Petitioner in stoppage of supply under the PPSA was in accordance with the provisions of the PPSA and the Ministry of Power's Order dated 28.6.2019 read with corrigendum dated 1.10.2021 and consequently, the claim of the Respondent No.1 upon the Petitioner towards the compensation as per Article 10.2.3 of the PPSA deserves to be set aside.

26. The issues are answered accordingly.

Issue No. 4: Whether any direction is required, at this stage, upon the Respondent No.1 to make such payment to Respondent No.2 through the Petitioner towards O & M expenses and interest cost as per the provisions of the PAPP/PPSA?

27. The Petitioner has further prayed for direction upon Respondent No.1 to make payment to Respondent No. 2 through the Petitioner as may be determined by the Commission towards O & M expenses and interest cost as per the provisions of the PPAP/PPSA. In this regard, the relevant provisions of the PPSA, being the Article 16.2, read as under:

"16.2 Compensation for default by the Utility

In the event of the Utility being in material breach or default of this Agreement at any time after the Appointed Date, it shall, upon receipt of the demand supported by necessary particulars, thereof, pay to the Aggregator by way of compensation, all direct costs suffered or incurred by the Aggregator as a consequence of such material breach or default; provided that no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this Agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O & M Expenses and all other costs directly attributable to such material breach or default but shall not include loss on account of Tariff, revenues from the sale of electricity to other Distribution Licensees and Buyers, and other revenues, debt repayment obligations, or any consequential losses...."

28. The aforesaid Article permits the Petitioner to raise a demand for compensation for all the direct costs suffered or incurred by the Petitioner as a consequence of any material breach or default of PPSA by Respondent after the

Appointed Date. However, a proviso therein further clarifies that no such compensation shall be payable for any material breach or default in respect of which damages have been expressly specified in the PPSA. The said Article also indicates certain examples as to what may be included in such compensation i.e. interest payment on debt, O & M expenses and other costs directly attributable to the material breach or default in question. However, in the present case, the prayer of the Petitioner for award of O & M expenses and interest cost is slightly different. The Petitioner, as such has not claimed any independent compensation on account of direct costs incurred or suffered by it on account of material breach or default by Respondent No.1 under the PPSA but has prayed for direction that all such cost as may be determined by the Commission in respect of Respondent No.2 under the PPAP, be directed to be paid by Respondent No.1 through the Petitioner. It is noticed that the claims of O & M expenses and interest costs by Respondent No.2 against the Petitioner herein, in terms of Article 17.2 of the PPAP (which corresponds to Article 16.2 of PPSA), have already been raised in Petition No. 340/MP/2022, which is currently pending for adjudication before the Commission. Hence, prior to the deciding upon the entitlement of Respondent No.2 towards such charges under the PPAP, the consideration of the prayer made by the Petitioner in the present case is, in our view, premature. Accordingly, we do not find any need to issue the direction upon Respondent No.1 in relation to the payment of O & M expenses and interest cost, as may be determined by the Commission in respect of Respondent No.2 herein at this stage. However, we grant the liberty to the Petitioner to approach the Commission in this regard, if required, after the disposal of Petitioner No. 340/MP/2022 by the Commission.

29. In view of the aforesaid findings and observations, we hold that the Respondent No. 1 is liable to make payment of monthly invoices raised by the Petitioner for the months of February, 2021 to May, 2021 and September, 2021 along with the LPS to be calculated in terms of the provisions of the PPSA within two months.

30. This issue is answered accordingly.

31. In view of the above findings, the Petition No. 234/MP/2022 is disposed of.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member