

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 360/MP/2022**

**Coram:**

**Shri Jishnu Barua, Chairperson  
Shri Arun Goyal, Member  
Shri P. K. Singh, Member**

**Date of Order: 7<sup>th</sup> May, 2024**

**In the matter of:**

Petition seeking payment of capacity charges by Respondent, in terms of the Declared Capacity, especially in terms of MOP directive dated 28.6.2019 and subsequent clarifications.

**And**

**In the matter of:**

**Coastal Energen Private Limited,**  
7th Floor, Buhari Towers, 4, Moores Road,  
District: Chennai – 600006

**...Petitioner**

**Versus**

**Tamil Nadu Generation & Distribution Corporation Limited,**  
144, Anna Salai,  
Chennai - 600 002

**...Respondent**

**Parties Present:**

Shri Neeraj Malhotra, Sr. Advocate, CEPL  
Shri Buddy Ranganadhan, Advocate, CEPL  
Shri Hemant Singh, Advocate, CEPL  
Shri Mridul Chakravarty, Advocate, CEPL  
Shri Biju Mattam, Advocate, CEPL  
Shri Chetan Garg, Advocate, CEPL  
Shri Lakshyajit Singh, Advocate, CEPL  
Shri Harshit Singh, Advocate, CEPL  
Ms. Alchi Thapliyal, Advocate, CEPL  
Shri Ayush Raj, Advocate, CEPL  
Shri Shaurya Kumar, Advocate, CEPL  
Shri Nlmish Kumar, Advocate, CEPL  
Ms. Anusha Nagarajan, Advocate, TANGEDCO  
Shri Rahul Ranjan, Advocate, TANGEDCO  
Ms. Aakanksha Bhola, Advocate, TANGEDCO



## **ORDER**

The Petitioner, Coastal Energen Private Limited (in short 'CEPL'), has filed the present Petition under Sections 79(1)(b), 79(1)(f), and 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as "the Act") seeking direction to Respondent, Tamil Nadu Generation & Distribution Company Limited (in short, "TANGEDCO") to make the payment of Rs. 282.63 crore towards its outstanding capacity charges based on the Declared Capacity (DC) and the directives issued by the Ministry of Power (in short, "MoP"). The Petitioner has made the following prayers:

*"a) Direct the Respondent to make payment of an amount of Rs. 282.63 crore to the Petitioner along with carrying cost, towards outstanding amounts for capacity charges, accrued under the Power Purchase Agreement dated 19.12.2013, and in terms of the Order dated 28.06.2019 and subsequent clarifications issued by the Ministry of Power;*

*b) In the interim, direct the Respondent/ TANGEDCO to release payment in terms of Article 8.6.9 of the PPA dated 19.12.2013, as detailed in Annexure P-32; and*

*c) Pass any other order as this Commission may deem fit in the facts and circumstances of the present case and in the interest of justice."*

### **Submissions of the Petitioner**

2. The Petitioner has mainly submitted as under:

(a) The Petitioner has executed a Power Purchase Agreement ("PPA") dated 19.12.2013 with Respondent for the supply of 558 MW power on the Round the Clock ("RTC") basis for the period from 1.6.2014 to 30.9.2028. Pursuant to the commencement of the supply of power under the PPA, the Petitioner has been raising monthly bills upon Respondent/ TANGEDCO, in accordance with Articles 8.2 & 8.3 of the PPA, which provides for billing and payment of the invoices raised towards the supply of power by the Petitioner to Respondent/TANGEDCO. However, Respondent not only failed to make payment of the monthly bills within the "Due Date" as defined under the PPA, but, also in multiple instances, failed to make any payment at all towards

such monthly bills. Upon such delay in making the monthly payment and non-payment, Article 8.3.5 of the PPA triggers, thereby entitling the Petitioner to claim a Late Payment Surcharge/ delayed interest.

(b) In order to curb this menace of non-payment of dues to the generating companies, the Ministry of Power (“MoP”), vide its order dated 28.6.2019, directed the Distribution Licensees (Discoms), to open and maintain the adequate Letter of Credit (“LC”) as Payment Security Mechanism (“PSM”) under the terms of the PPA. Subsequently, MoP issued a clarification dated 9.8.2019 directing the Discoms to provide an unconditional LC for power purchases to be made from 1.8.2019 onwards. Despite the aforesaid unambiguous and express clarifications issued by the MoP that the LC must be unconditional and must be equal to the power purchase requirement for the said billing cycle, Respondent proceeded to furnish an LC on 30.7.2019 (along with subsequent amendments as detailed hereinunder) to the tune of Rs. 136 crore in favour of the Petitioner, which was conditional in nature. Hence, the said LC was not in terms of Article 8.4 of the PPA, and was also in complete contravention of the order dated 28.6.2019 issued by the MoP along with its clarification dated 9.8.2019. As such, the above conditional LC was issued by Respondent to cover the value of power supply from the Petitioner with effect from 1.8.2019. It is an undisputed position that in the event, the power supply value exceeded the LC limits, the Discoms were under a mandatory obligation to release advance payment(s) to the generating companies. Any failure on the part of the Discoms to adhere to the same would entitle the generating companies to encash the LC in terms of the provisions of the PPA.

(c) The Petitioner, on various occasions vide its letters dated 3.7.2020, 4.10.2021, 26.10.2021, 15.12.2021, 4.3.2022, 23.3.2022 and 29.4.2022 requested Respondent to provide an unconditional LC in terms of the PPA and the order/ clarification issued by the MoP.

(d) On various occasions, the value of the power supplied by the Petitioner had crossed/ exceeded the LC provided by Respondent, and since, the LC was conditional in nature, the Petitioner was unable to encash the same.

Accordingly, the only choice/option available to the Petitioner was to regulate the power supply and claim capacity charges. In terms thereof, the Petitioner was forced to stop the supply of power to the Respondent on multiple occasions during the financial years 2020-21 and 2021-22 on account of the non-fulfilment of its obligations by Respondent to make the payment of the monthly invoices and to open the requisite quantum of the Payment Security Mechanism (PSM) in terms of the directions issued by the MoP.

(e) The default in performance of obligations by Respondent, specifically non-payment of the power supply bills, resulted in the inability of the Petitioner to continue further procurement of coal and sustain the plant operations. However, to the utter shock and dismay of the Petitioner, Respondent not only failed to release any further amount towards the outstanding liability, but with a motive of escaping its liability, also disputed the monthly bills raised by the Petitioner during which the supply of power was regulated by the Petitioner on account of the default in performance of obligations by Respondent specifically non-payment of the dues and insufficiency in the amount of the PSM as per the directives of the MoP.

(f) Rs. 282.63 crore is outstanding against Respondent/TANGEDCO towards the capacity charges, which is payable to the Petitioner in terms of the availability declared by it.

### **Hearing dated 21.3.2023**

3. The matter was admitted on 21.3.2023. During the course of the hearing, the learned counsel for the Petitioner submitted that in terms of the Commission's order dated 31.5.2021 in Petition No. 351/MP/2018 (CEPL v TANGEDCO & anr) this Commission has the jurisdiction in the matter.

4. After hearing the learned counsel of the Petitioner, notice was issued to the Respondent to file its reply both on jurisdiction and merits, after serving copy on the

Petitioner, who may, file its rejoinder, if any. Accordingly, Respondent has filed reply and the Petitioner has filed rejoinder thereof.

### **Reply of Respondent**

5. The Respondent, TANGEDCO, vide its reply filed on 2.6.2023, has mainly submitted as under:

(a) The “composite scheme” referred to under Section 79(1)(b) of the Act, must be determined with reference to the PPA under which the dispute arises; the fact that the generating company, through arrangements completely separate from the PPA, is supplying power through inter-State sale is irrelevant for this purpose.

(b) The State Commissions exercise jurisdiction where generation and sale of power take place in one State, and this Commission exercises jurisdiction if such generation and sale of power is inter-State. The incidence which determines whether the State Commission or this Commission exercises jurisdiction is the incidence of *generation and sale of power over which jurisdiction is to be exercised*. This is further made clear by the specific finding of the Hon’ble Supreme Court that *it is the PPA which is governed by either the State Commission or the Central Commission*. Therefore, it is amply clear that what this Commission exercises jurisdiction over is the PPA under which disputes have arisen, and not the generator. The Electricity Regulatory Commissions under the Act exercise jurisdiction over the PPAs/ arrangements under which disputes have arisen, and not the generating company.

(c) The fact that the Petitioner as a generating company, had certain other arrangements under which it was selling power outside the State of Tamil Nadu (in this case, there are no subsisting inter-State arrangements), is irrelevant (if no dispute has been raised under those arrangements in the present Petition), for determining whether there exists a “composite scheme” under Section 79 of the Act, over which this Commission may exercise jurisdiction. As under the subject PPA, power is only being generated in and

supplied to the Tamil Nadu, the State Commission is the proper forum for the adjudication of disputes thereunder.

(d) The Petitioner has unlawfully computed the capacity charges in excess and over the declared capacity on the part of CEPL under the pretext of inadequate payment mechanisms on the part of TANGEDCO for the financial year 2021-22, which involves the alleged claim amount of Rs. 275 crore (approximately). For the financial year 2020-21, CEPL and TANGEDCO had reconciled the outstanding amount, and CEPL had admitted that an amount of Rs. 6,32,65,813.00 was payable by TANGEDCO towards shortfall in capacity charges vide its letter dated 30.4.2021. In the said letter dated 30.4.2021, CEPL had agreed to settle all disputes and reconciled the energy bills and agreed to withdraw its claim against TANGEDCO in terms of the dispute notices issued by TANGEDCO, and referred to in S. Nos. 2 to 8 and the amount was reconciled to Rs 6,32,65,813.00 by CEPL. This amount was adjusted against the outstanding dues from CEPL for the year 2015-16 as follows:

(i) Amount due to CEPL during 2020-21	Rs, 6,32,65,813.00
(ii) Amount in excess paid to CEPL during 2015-16	Rs. 5,98,91,208.00
(iii) Balance amount to be paid to CEPL	Rs. 33,74,605.00

However, CEPL has, without basis, revised its claim for the financial year 2020-21 from Rs. 6,32,65,813/- to Rs 7,12,66,517/-, in the Petition filed before this Commission for the first time and wrongfully failed to acknowledge that, after adjustment, only a sum of Rs. 33,74,605/- was payable to CEPL.

(e) CEPL has alleged that a sum of Rs. 275 crore (approximately) is due towards capacity charges for the financial year 2021-22 for energy not scheduled by CEPL up to the declared availability. TANGEDCO has issued a valid and adequate standby Letter of Credit of Rs. 136 crore X 12 months towards the Payment Security Mechanism as per Article 8.4.11 of the PPA. Therefore, the basis on which the CEPL has claimed that it was entitled to regulate power is entirely misconceived.

(f) Capacity charges claimed by the Petitioner, CEPL, in respect of such energy was disputed by TANGEDCO, and the Bill Dispute Notices were duly raised in terms of the PPA. As pointed out by TANGEDCO in its Bill Dispute Notice, PSM (Letter of Credit) has been maintained for a value equivalent to 1.1 times of average monthly bills in terms of Article 8.4.11 of PPA. In response, the Petitioner took the stance that the value of LC maintained was inadequate, considering the past outstanding dues payable by TANGEDCO. The Petitioner has sought to rely upon the directives issued by the Ministry of Power in order to justify the regulation of power. In this context, the MoP directives/ guidelines require a distribution licensee to maintain the LC in accordance with the provisions of the PPA.

(g) As per MoP Guidelines/directives, the Regulation of Power supply can only be done if the LC is not maintained in accordance with the PPA. The MoP Guidelines/ directives do not modify the terms of the PPA with respect to the maintenance of LC. There is no stipulation that a Distribution Licensee has to maintain LC for the cumulative outstanding dues for the past period. Thus, the LC maintained by TANGEDCO was duly compliant with both, the PPA, as well as the MoP Guidelines/ directives.

(h) For the financial year 2021-22, disputes have been raised by TANGEDCO in respect of the bills raised by CEPL, summarized as under:

Sr. No.	Period	Amount Claimed	Details of Dispute	Remarks
1.	April 2021- July 2021			No dispute raised by CEPL.
2.	August 2021	Rs. 27,65,23,799/- vide Invoice dated 04.09.2021.	TANGEDCO admitted an amount of INR 1,24,56,29,674.00 under protest vide bill dispute notice dated 01.10.2021 and denied amount of INR 3,08,94,125.00 for 122.2985 MU for period of 11 days from 21.08.2021 to 31.08.2021 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for undeclared capacity.	All the Payments were made to CEPL for the declared and scheduled energy. The disputed claim of Rs. 275.49 crore (approx.) pertains to raising invoicing without declaration of energy by stating the reason of non-availability of Payment Security Mechanism (PSM) is incorrect. TANGEDCO issued valid standby LC of Rs. 136 crores X 12
3.	September 2021	Rs. 95,83,20,195/- vide Invoice dated 04.10.2021	TANGEDCO admitted an amount of INR 93,14,42,070.00 under protest vide bill dispute notice dated 01.10.2021 and denied amount of INR 2,68,78,125.00 for 107.5125 MU for period of 13 days from	

			01.09.2021 to 04.09.2021 and from to 22.09.2021 to 30.09.2021 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.	months towards PSM as per PPA clause 8.4.11. In the event of delay in making payment, CEPL would have encashed the LC and TANGEDCO would have been reinstated the LC as per the provisions of PPA.
4.	October 2021	Rs. 53,35,94,866/- vide Invoice dated 06.11.2021  (Energy Charges- NIL)	TANGEDCO admitted an amount of INR 7,49,27,682.00 under protest vide bill dispute notice dated 04.12.2021 and denied amount of INR 45,86,67,184.00 for 415.152 MU for period of 31 days from 01.10.2021 to 31.10.2021 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.	
5.	November 2021	Rs. 55,00,43,303/- vide Invoice dated 2.12.2021	TANGEDCO admitted an amount of INR 11,54,02,141.00 under protest vide bill dispute notice dated 07.01.2022 and denied amount of INR 43,46,41,162.00 for 273.57 MU for period of 25 days from 01.11.2021 to 25.11.2021 without declaration and scheduling of power. Also claimed 60.56MU as force majeure on account of heavy rainfall for 5 days between 26.11.2021 to 30.11.2021. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.	
6.	December 2021	Rs. 94,48,19,868/- vide Invoice dated 4.1.2022	TANGEDCO admitted an amount of INR 91,00,43,693.00 under protest vide bill dispute notice dated 01.02.2022 and denied amount of INR 3,47,76,175.00 for 52.89 MUs for period of 5 days from 27.12.2021 to 31.12.2021 without declaration and scheduling of power. Also claimed 87.59MU as force majeure on account of heavy rainfall for 15 days between 01.12.2021 to 15.12.2021. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.	
7.	January 2022	Rs. 53,57,12,141/- vide Invoice dated 4.2.2022  Energy Charges - NIL	TANGEDCO admitted an amount of INR 9,74,66,487.00 under protest vide bill dispute notice dated 23.02.2022 and denied amount of INR 63,31,78,628.00 for 415.152 MU for period of 31 days from 01.01.2022 to 31.01.2022 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.	
8.	February 2022	Rs.61,21,64,655/- vide Invoice dated 3.3.2022	TANGEDCO admitted an amount of INR 9,43,71,660.00 under protest vide bill dispute notice dated 15.03.2022 and denied amount of INR 51,77,92,995.00 for 344.001	



			MU for period of 28 days from 01.02.2022 to 28.02.2022 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.
9.	March 2022	Rs.52,04,18,946/- vide Invoice dated 5.4.2022  Energy Charges - NIL	TANGEDCO admitted an amount of INR 9,76,86,349.00 under protest vide bill dispute notice dated 16.04.2022 and denied amount of INR 61,81,05,295.00 for 348.192 MU for period of 26 days from 01.03.2022 to 26.03.2022 without declaration and scheduling of power. Hence, TANGEDCO is not liable of amount claimed for un-declared capacity.

(i) A chart summarising the invoices raised and payments made, in respect of the financial year 2021-22, is as under:

Sr. No.	Period	Amount Claimed	Amount Admitted	Amount Paid & Payment Details	Out Standing Amount	Alleged difference amount claimed by CEPL
1.	April 2021	Rs. 145,99,71,546	Rs. 145,99,71,546	Paid Rs. 145,99,71,546 in 2 instalments vide Cheques dated 01.10.2021 and 05.10.2021.	Nil	
2.	May 2021	Rs. 94,44,03,699	Rs. 94,43,41,836	Paid Rs. 94,43,41,836 vide cheque dated 05.10.2021	Nil	
3.	June 2021	Rs. 82,07,03,554	Rs. 82,07,03,554	Paid Rs. 81,98,82,850 (less TDS) vide cheque dated 05.10.2021	Nil	
4.	July 2021	Rs. 82,85,69,634	Rs. 82,84,60,113	Paid Rs. 82,76,31,653 (less TDS) vide cheque dated 05.10.2021	Nil	
5.	August 2021	Rs. 127,65,23,799	Rs. 124,56,29,674	Paid Rs.100,00,00,000 in 2 instalments vide cheque dated 14.3.2022 and 21.4.2022	Rs.24,56,29,674.00	part of the liquidation plan
6.	September 2021	95,83,20,195	93,14,42,070	Amount of Rs. 193,10,34,411 Part of Liquidation Plan		
7.	October 2021	53,35,94,866	7,49,27,682			
8.	November 2021	55,00,43,303	11,54,02,141			
9.	December 2021	94,48,19,868	91,00,43,693			
10.	January	53,57,12,141	9,74,66,487			

	2022				Amount of Rs. 193,10,34, 411 Part of the Liquidation Plan	
11.	February 2022	61,21,64,656	9,43,71,661			
12.	March 2022	52,04,18,946	9,76,86,349			
	<b>Total</b>	<b>998,52,46,207</b>	<b>723,01,41,134</b>			<b>275,51,05,073</b>

(j) Despite TANGEDCO having maintained LC in terms of the PPA and for the requisite amount under the PPA, CEPL claimed capacity charges in respect of the energy not scheduled, on the ground that it was entitled to regulate the power. Even in case of the delay, admittedly, TANGEDCO has made payment against its dues, including the LPS. TANGEDCO has only withheld payment of the amount disputed by it by virtue of CEPL having claimed capacity charges for energy not scheduled. In any event, even if there is a delay on the part of TANGEDCO in payment of the monthly invoices, the CEPL cannot restrict the supply of power to TANGEDCO as it has done in the present case. The PPA contemplates certain remedies that are available to CEPL in the event that it does not receive the payment against its invoices.

(q) The Petitioner's first remedy in the event of non-payment of monthly invoices is invoking the LC under Article 8.4. It is clear from the above that, in case TANGEDCO fails to make the timely payment of the invoices, CEPL can take the steps, namely (i) in the first instance, invoke the LC issued by TANGEDCO without any reference to TANGEDCO, and (ii) In the event, CEPL is unable to recover its dues through the LC, CEPL 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 the contracted capacity being sold to another buyer that TANGEDCO may be deprived of the said power. In the present case, CEPL has not taken recourse to any of the above remedies, and has without justification, refused to schedule power. At this time, CEPL had not even attempted to invoke the LC issued by TANGEDCO.

(r) As is apparent from Article 8.5.1 read with Articles 8.5.2 and 8.5.5 of the PPA, it is only in the event of inability to recover dues through LC that CEPL may sell whole or part of the contracted capacity to another buyer or third party; this is the only event in which CEPL may cease supply of power to

TANGEDCO. However, even after CEPL's purported failure to recover dues from the invocation of the LC, till date, CEPL 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 8.5 of the PPA. Therefore, CEPL, instead of taking steps for recovery of its dues as prescribed under the PPA, stopped declaring and scheduling power to TANGEDCO, which is impermissible under the PPA. The claim of Rs. 275 crore (approximately) on account of the non-payment of the capacity charges has been raised for the first time before this Commission. This is in breach of Articles 8.6.5 and 8.6.6 of the PPA, which prescribe a mechanism for resolving disputes in relation to invoicing.

(s) CEPL and TANGEDCO, by executing the PPA, have agreed upon a procedure which allows CEPL to recover its outstanding dues from TANGEDCO. In complete derogation of this agreed procedure, CEPL ceased scheduling 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].

(t) CEPL's case on this issue appears to be that it was constrained to stop the scheduling power to TANGEDCO due to outstanding dues. In this regard, it is essential to appreciate that during the financial year 2021-22, CEPL raised invoices for Rs. 998 crores (approximately); TANGEDCO admitted a sum of Rs. 723 crores (approximately) and made a payment of Rs. 505 crores, while the balance amount of Rs. 218 crores (approximately) was included in the liquidation plan in terms of the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022 notified on 3.6.2022 (CIL Rules). Having received this significant amount, there is no basis for CEPL to contend that it was unable to supply the power due to the pending dues or to assert any right to regulate the power on this basis. In this regard, reliance has been placed on the decision of the Hon'ble Calcutta High Court in the case of Tata Iron & Steel Company Ltd. v. Ramanlal Kandoi, [MANU/WB/0383/1970], wherein the Hon'ble High Court held that merely because certain bills were not paid by one party, the other party cannot be allowed to say that it was

prevented from the performance of its part of the agreement. Therefore, it is apparent that CEPL's action of stopping the scheduling of power to TANGEDCO is wholly outside the purview of the PPA-CEPL failed to avail itself of the remedies in the event of the non-payment of monthly invoices available under the PPA. Such action is also opposed to contract law. Since TANGEDCO had disbursed upwards of Rs. 505 crores (approximately) and 218 crores (approximately) included in the liquidation plan during the financial year 2021-22 against the claimed amount of Rs. 998 crores (approximately), non-payment of certain past invoices could not have prevented the CEPL from supplying the power.

### **Non-supply of Power for extraneous reasons**

(u) CEPL did not stop scheduling power to TANGEDCO due to non-payment of past invoices, but on account of increase in prices of the imported coal, which made operation of CEPL's power plant more expensive.

(v) CEPL was not willing to operate its power plant due to an increase in the price of imported coal, which was causing it to incur losses when selling power for the tariff discovered under the competitive bidding process. Had this not been the case, the contracted quantum under the PPA would have been sold to third-party buyers to recover the outstanding dues, as contemplated by Article 8.5 of the PPA. Therefore, CEPL itself not having been ready and willing to supply the power, is not entitled to make any claim for the capacity charges on the basis of the regulation of power supply. It is further disingenuous on the part of CEPL to contend that the supply of power to TANGEDCO was halted owing to an act or omission on the part of TANGEDCO.

(w) Without prejudice to the above, if CEPL was constrained to stop the scheduling of power due to TANGEDCO's actions, it was obligated to take steps to mitigate any loss caused. This position has also been endorsed by this Commission in its order dated 22.4.2013 in Petition No. 137/MP/2011 in the case of *NTPC v. WBERC & Ors.* In the present case, Article 8.5 of the PPA itself prescribes a sale to another buyer in the event that invoices remain unpaid. It is not CEPL's case that the contracted capacity was thus sold; there

is further no averment with respect to the CEPL taking any steps to mitigate the alleged loss caused to them.

### **Rejoinder of the Petitioner**

6. The Petitioner, vide its rejoinder dated 22.6.2023, has mainly submitted as under:

(a) The bills raised upon Respondent along with its replies (in the form of Bill Dispute Notices) are all annexed to the present Petition, and upon analysis of the same, it noted that the amount towards monthly invoices has been pending since August 2019 to March 2022 (along with the Late Payment Surcharge), which accumulate to a cumulative amount of Rs. 282.63 crores. The alleged reconciliation between the Petitioner and the TANGEDCO qua outstanding amounts for the financial year 2020-21 towards shortfall in capacity charges never materialised between the parties since the TANGEDCO failed to make the requisite payment in terms of the reconciliation, and as such, no further communication in that regard was received from the TANGEDCO. A perusal of the letter dated 30.4.2021 indicates that in view of amicably resolving the dispute raised by the TANGEDCO vide various Bill Dispute Notices, the Petitioner had agreed to reconcile figures as per the said Notices, subject to the final payment by Respondent of a cumulative total amount of Rs. 6,32,65,813/- towards the shortfall in the capacity charges for the financial year 2020-21. However, TANGEDCO failed to make any payment and further did not intimate/ update the Petitioner as regards the above amount. Since the payment was not at all made by the TANGEDCO, no such reconciliation was materialized between the parties, and accordingly, the amount as disputed by the Petitioner in the present Petition for the financial year 2020-21 is correct and the letter dated 30.4.2021 relied upon the TANGEDCO is of no consequence at all.

(b) The Letter of Credit furnished by TANGEDCO on 30.7.2019 to the tune of Rs. 136 crores was conditional in nature. Therefore, the LC was not in conformity with Article 8.4 of the PPA dated 19.12.2013 read with the order dated 28.6.2019 issued by the MoP along with its clarification dated 9.8.2019.

Despite the aforesaid unambiguous and express clarifications issued by the MoP that the LC must be unconditional and must be equal to the power purchase requirement for the said billing cycle, the same was not done by TANGEDCO. Since the power supply quantum at the very beginning exceeded the LC limits, the distribution licensee (Respondent in the present case) was under a mandatory obligation to release advance payment(s) to the Petitioner. However, despite several letters issued by the Petitioner to the TANGEDCO, the LC was not modified at all. Since on various occasions, the value of the power supplied by the Petitioner had crossed/ exceeded the LC provided by Respondent/ TANGEDCO, and since the LC was conditional in nature, the Petitioner was not able to encash the same. Therefore, the contention of Respondent/ TANGEDCO that the Petitioner could have availed the relief as contemplated under the PPA is untenable as the only choice/ option available to the Petitioner was to regulate the power supply and claim capacity charges.

(c) The default in performance of the obligations by the TANGEDCO, specifically non-payment of the power supply bills, acted as the catalyst resulting in the inability of the Petitioner to continue further procurement of coal and sustain its plant operations due to lack of the adequate working capital. The generating companies in order to sustain and maintain the smooth operation of their plants have to maintain enough inventory of coal, amongst other things. For the aforesaid purposes, the generators have to pay the price of coal and railway freight in advance, amongst other charges. Accordingly, any delay in payment of the monthly supply bills and other charges by the State Discoms negatively impacts and affects their ability to procure the coal and maintain the inventory, which consequently affects the operations of the plant. In doing so, the Discoms rob the generator's ability to supply power not only to them but also to other beneficiaries and States as well, due to a shortage of cash flows on account of the delayed/ non-payment of the bills. On account of the default in the performance of obligations by Respondent/ TANGEDCO, specifically the non-payment of outstanding dues, the Petitioner faced difficulty in procuring the fuel, servicing debt obligations,

and arranging operational expenses to meet its other contractual obligations without there being any default on its part. Therefore, the operation and viability of the Petitioner's power plant were becoming difficult with each passing day. Accordingly, regulation of supply was the only option available to the Petitioner as the Petitioner was not in a position to continue with further procurement of fuel in order to continue supplying the power to Respondent/ TANGEDCO.

(d) With regard to the jurisdiction, the Petitioner's generating station is situated in the State of Tamil Nadu and it has the following arrangements for the supply of power which are subsisting as on date of the filing of the present Petition:

- (i) PPA with Respondent/ TANGEDCO dated 19.12.2013 for the period from 1.6.2014 to 30.9.2028 (i.e., for 15 years) for supply of the 558 MW quantum of power in the State of Tamil Nadu.
- (ii) PPA dated 1.10.2022 with Manikaran Power Limited ("MPL") for supply of the 300 MW quantum of power, for a period of one year from the date of signing of the PPA exclusively for the supply of power outside the State of Tamil Nadu.

(e) The principle laid down by the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC & Ors.*, [reported in 2017 (14) SCC 80] was duly followed by the Commission in its order dated 31.5.2021 in Petition No. 351/MP/2018 (*between the same Petitioner and the same Respondent as in the present case*). A reading of the above order answers the issues raised by Respondent in the present reply, which can be summarized, namely (i) Energy Watchdog Case does not establish any such qualifying criteria with regard to the term of the contract for a scheme to be classified as "*composite scheme*", and as such, the contention of Respondent/ TANGEDCO to link composite scheme with long term or medium term PPA does not have any merit; (ii) Accordingly, the contention of Respondent that the Petitioner did not have a composite scheme at the time of filing of the Petition is also incorrect as it is also an effort to link composite scheme with the duration of the PPA; and as such, since the Petitioner meets the criteria of generation

and sale of electricity to more than one State, this Commission is well within its jurisdiction to entertain the present Petition.

(f) It is falsely contended by Respondent/ TANGEDCO in its reply that certain issues raised by it in Petition No. 351/MP/2018, though recorded by this Commission in its final order dated 31.5.2021 were not dealt with, which also forms part of the submissions of Respondent in the present Petition. It is evident that the major contentions of TANGEDCO raised in the present case qua term of the PPAs or no inter-State PPA at the time of filing the Petition, etc., were all duly considered and settled by this Commission. TANGEDCO ought not to make false statements on an affidavit. Moreover, the findings of the order in Petition No. 351/MP/2018 were never challenged by Respondent/ TANGEDCO and have attained finality. As such, the Respondent/ TANGEDCO cannot be permitted to raise an issue that has already attained finality in the present Petition.

(g) With respect to the issue of Respondent that whether subsistence of short-term and intermittent arrangements would suffice to constitute a composite scheme for the generation and sale of electricity in more than one State, this issue was squarely dealt with by this Commission in its order dated 31.5.2021 in Petition No. 351/MP/2018.

7. The matter was finally heard on 8.12.2023. During the course of the hearing, the learned senior counsel for the Petitioner and the learned counsel for the Respondent, TANGEDCO, made detailed submissions in the matter. Considering their request, the Commission permitted the parties to file their respective written submissions, if any, within three weeks with a copy to the other side. The Commission also directed the Petitioner and Respondent to furnish certain details along with their written submissions. Subject to the above, the matter was reserved for order.

### **Written submissions of Parties**



8. The Petitioner and Respondent, TANGEDCO, have filed their respective written submissions which have been dealt with in subsequent paragraphs. Pursuant to the direction of the Commission vide Record of Proceedings for the hearing dated 8.12.2023, the Petitioner has also submitted the information/ data for the purpose of adjudicating the present Petition.

### **Analysis and Decision**

9. After considering the submissions of the parties and perusal of the documents placed on the record, the following issues arise for consideration:

**Issue No. 1: Whether this Commission has jurisdiction to deal with the instant Petition under Section 79(1), particularly, under Section 79(1)(b) read with Section 79 (1)(f) of the Act in view of the objections raised by Respondent, TANGEDCO?**

**Issue No. 2: Whether the Petitioner is entitled to capacity charges for the alleged period of power supply regulation by it in terms of the PPA dated 19.12.2013 and the Ministry of Power's Order dated 28.6.2019 read with subsequent clarifications thereto?**

The above issues have been dealt with in the subsequent paragraphs.

**Issue No.1: Whether this Commission has jurisdiction to deal with the instant Petition under Section 79(1), particularly, under Section 79(1)(b) read with Section 79 (1)(f) of the Act in view of the objections raised by Respondent, TANGEDCO?**

10. The Petitioner has submitted that this Commission has the necessary jurisdiction to entertain the present Petition and to provide the reliefs as sought in the Petition. The Petitioner has submitted that the Commission in its order dated 31.5.2021 in Petition No. 351/MP/2018 (*Coastal Energen Ltd. v. TANGEDCO and Anr.*) has already held that the generating station of the Petitioner has a composite scheme of generation and supply in more than one State, and this Commission has jurisdiction with respect to the Petitioner's generating station. The Petitioner has submitted that it is necessary to highlight this aspect because not only is the

Respondent's contention false, but the order of 31.5.2021 elaborately details the jurisprudence behind the term 'composite scheme' and has since attained judicial finality. TANGEDCO never cared to assail the said order in appeal, assuming that it was gravely aggrieved by the findings rendered therein as projected in the present case. Therefore, the legal principles and the ratio so laid down would not only substantially bind the TANGEDCO but the same would nullify and obliterate the cryptic and cliched objections repeatedly being taken. To address TANGEDCO's contention that the term 'composite scheme' would not be applicable if there is no long-term or medium-term PPA along with the allegation that there was no composite scheme on the date of filing of Petition No. 351/MP/2018, this Commission specifically relied on Para 22 and specially Para 24 of the Energy Watchdog Judgment (Supra) as evident from a reading of Paras 19 & 20 of the order dated 31.5.2021. In the subsequent paragraph, this order records the judicial principles laid down by the Apex Court to say that the State Commission's jurisdiction is where generation and supply take place within the State, the moment generation and sale takes place in more than one State 'in any manner', the Central Commission becomes the Appropriate Commission under the Act, and, 'composite scheme' does not have any special meaning. This Commission in Para 21 of the said order specifically records that apart from the TANGEDCO PPA, the Petitioner is selling power to other States through various contracts/ LOIs, etc., and for this, it meets the criteria of generation and sale of electricity to more than one State. This Commission also categorically rejected the endeavour of TANGEDCO to link the composite scheme exclusively with the terms of the contract, i.e., a contract should be long-term or medium-term PPAs, and ultimately, this Commission holds that in terms of the ratio- decidendi laid down in the Energy Watchdog Judgment (Supra),

the Petitioner qualified to be a composite scheme to attract the jurisdiction of this Commission in terms of Section 79(1)(b) of the Act. As submitted before, the principles of law settled and the ratio laid down in the order dated 31.5.2021 have attained judicial finality since no challenge has been mounted to the same in appeal by TANGEDCO. Also, the attempt of TANGEDCO to re-open this issue is hit by the principles of res-judicata and it is legally bound by the contours of the said order. The Petitioner has submitted that any deviation from this order shall result in stark illegality and travesty of the principles of justice. At this interval, it thus becomes important to juxtapose and examine the detailed judicial connotations rendered by the Hon'ble Supreme Court qua 'composite scheme' in Energy Watchdog Judgment (Supra) with the order dated 31.5.2021 and its findings. According to the Petitioner, it has arrangements for the generation and sale of power in more than one State inasmuch as it has a long-term PPA with TANGEDCO, and it has also entered into various contracts/agreements for the sale of power from the Petitioner's generating station. In support, the Petitioner has placed on record the Commission's order dated 31.5.2021 in Petition No. 351/MP/2018 (Coastal Energen Ltd. v. TANGEDCO and Anr.) and has submitted that in the said order dated 31.5.2021, this Commission has already held that the generating station of the Petitioner has a composite scheme of generation and supply in more than one State, and this Commission has the jurisdiction with respect to the Petitioner's generating station. The Petitioner has submitted the details of the PPAs and Lols entered into with the Discoms and trader, MHPPL & Manikaran Power Ltd.(MPL) as under:

	<b>PPA</b>	<b>Discoms</b>	<b>Period</b>	<b>Quantum</b>
1.	Long-term PPA dated 19.12.2013	TANGEDCO (Bilateral)	1.6.2014 to 30.9.2028	558 MW

2.	Day Ahead Market in Indian Energy Exchange (IEX)	Delivery Point: Southern Regional Periphery	January, 2016 to 31.12.2019	1307 MUs
3.	MoU dated 28.11.2015	MHPPL (to Telangana State Power Committee)	January, 2016 to December, 2018	300 MW
4.	PPA dated 29.2.2016	MHPPL (to Telangana State Power Committee)	5.3.2016 to 26.5.2016 (on as and when required basis) 1.4.2016 to 31.3.2016 (on firm basis)	300 MW
5.	PPA dated 21.3.2016	MHPPL (to Telangana State Power Committee)	27.5.2016 to 25.5.2017	150 MW
6.	Lol issued by Telangana State Power Co-ordination Committee dated 27.2.2016	Telangana DISCOMs	27.5.2016 to 25.5.2017	150 MW
7.	Lol issued by Telangana State Power Co-ordination Committee dated 29.2.2016	Telangana DISCOMs	5.3.2016 to 31.3.2016 and 1.4.2016 to 26.5.2015	300 MW
8.	PPA dated 1.10.2022	Manikaran Power Limited	300 MW	One year from the date signing

11. *Per contra*, Respondent, TANGEDCO has submitted that the Petitioner does not have any arrangements for the supply of electricity to any entity other than TANGEDCO under the PPA dated 19.12.2013 for the supply of 558 MW out of an installed capacity of 1200 MW. Under Section 79(1)(b) of the Act, this Commission regulates the tariff of the generating companies if such generating companies enter into or otherwise have a composite scheme for the generation and sale of electricity in more than one State. In a case where the tariff is to be determined under Section 62 of the Act, Section 79(1)(b) would have to be interpreted in a manner that is

generating company-centric, as the tariff is determined for the generating station, and is applicable irrespective of the parties to which power is sold. Therefore, when the generating company has arrangements for the generation and sale of electricity in more than one State, this Commission is the Appropriate Commission to determine the tariff for such generating company. Regulation of tariff in the context of the PPAs entered into pursuant to a competitive bidding process under Section 63 of the Act, is a PPA-centric exercise and not a generating station-centric exercise. Each PPA entered into by the generating company is pursuant to a separate competitive bidding process, and tariff is separately adopted in respect of each such PPA. Therefore, in that context, the test of composite scheme would have to be applied qua each PPA, i.e., whether the PPA constitutes a composite scheme for the generation and sale of electricity in more than one State. The “composite scheme” referred to under Section 79(1)(b) of the Act, must be determined with reference to the PPA under which the dispute arises; the fact that the generating company, through arrangements completely separate from the PPA, is supplying power through inter-State sale is irrelevant for this purpose. The fact that the Petitioner as a generating company, had certain other arrangements under which it was selling power outside the State of Tamil Nadu (in this case, there are no subsisting inter-State arrangements), is irrelevant (if no dispute has been raised under those arrangement in the present Petition), for determining whether there exists a “composite scheme” under Section 79 of the Act, over which this Commission may exercise jurisdiction. As under the subject PPA, power is only being generated in and supplied to the Tamil Nadu, the State Commission is the proper forum for adjudication of disputes thereunder. This Commission did not, in any event, have the opportunity to consider the issue as to whether a composite scheme has to be

construed in the context of the PPA which is subject matter of adjudication, and hence necessarily requires inter-State sale of power under such PPA. This Commission, in its order dated 31.5.2021 passed in Petition No. 351/MP/2018, has not disapproved of this purposive interpretation of the law laid down in *Energy Watchdog (supra)*. In light of the Hon'ble Supreme Court's decision in *Energy Watchdog (supra)*, this Commission cannot exercise jurisdiction to adjudicate the disputes raised in the present Petition. Towards this, its previous order in Petition No. 351/MP/2018 cannot be considered *res judicata*, as the said order will allow something that is impermissible under statute (*Canara Bank v. N.G. Subbaraya Setty*, [(2018) 16 SCC 228, para 5]).

12. TANGEDCO has further submitted that after filing of the captioned Petition, the Petitioner in Petition No. 161/MP/2022 filed an affidavit dated 5.12.2022 demonstrating beneficiary-wise quantum of power tied up during the period from 6.5.2022 to 5.12.2022 wherein CEPL admittedly supplying power only to TANGEDCO for the contracted capacity. Further, the arrangement demonstrated in Order dated 31.5.2021 passed by this Commission in Petition No. 351/MP/2018 lapsed before filing of the captioned Petition and admittedly, there were no arrangement for the composite scheme as on the date i.e., on 14.11.2022 before this Commission especially in light of the facts of affidavit dated 5.12.2022 filed by CEPL in Petition No. 161/MP/2022. In response to TANGEDCO's reply dated 2.6.2023, the Petitioner along with the rejoinder dated 22.6.2023 annexed the Memorandum of Understanding ("MoU") dated 1.10.2022 (which already expired on 30.9.2023) executed with Manikaran Power Limited, a trading licensee for sale of electricity at Power Exchange. It is pertinent that the arrangement with Manikaran Power Limited

was for a period of one year between 1.10.2023 and 30.9.2023. Respondent, TANGEDCO has submitted that the present Petition is not maintainable in the absence of the 'composite' scheme, as it does not have any subsisting PPA except for the PPA with TANGEDCO. Therefore, as on the date, there are no composite arrangements for the supply of power outside the State of Tamil Nadu. Accordingly, this Commission does not have jurisdiction under Section 79 (1)(b) & (f) of the Act. The Respondent has submitted that CEPL has failed to demonstrate the sale of power even through the arrangement with the Manikaran during the period in dispute between the parties i.e., for the financial years 2020-21 and 2021-22. In the absence of the Petition alluding to any subsisting composite arrangements of generation and sale of power outside the State of Tamil Nadu, the present Petition is not maintainable and this Commission has no jurisdiction to entertain, try or grant the relief sought therein.

13. Respondent TANGEDCO, while placing the reliance on the findings of the Energy Watchdog (supra), has submitted that the Electricity Commissions under the Act exercise jurisdiction over the PPAs/ arrangements under which disputes have arisen and not the generating company. The composite scheme has to be construed in the context of the PPA, which is the subject matter of the adjudication. The State Commissions exercise jurisdiction where the generation and sale of power take place in one State, and this Commission exercises jurisdiction if such generation and sale of power is inter-State. The incidence that determines whether the State Commission or this Commission exercises jurisdiction is the incidence of generation and sale of power over which the jurisdiction is to be exercised. It is the PPA, which is governed by either the State Commission or the Central Commission.

14. We have considered the submissions of the parties and perused documents on the record. According to the Petitioner, since in terms of Section 79(1)(b) of the Act, it has a composite scheme for the generation and sale of electricity in more than one State, this Commission has the jurisdiction to adjudicate the disputes in question. Respondent TANGEDCO has submitted that the composite scheme, as specified under Section 79(1)(b) of the Act, means a scheme by a generating company for the generation and sale of electricity in more than one State. According to TANGEDCO, the generating station of the Petitioner does not have arrangements of any kind for the generation and sale of electricity in any State apart from the State of Tamil Nadu.

15. The relevant extract of Section 79(1) of the Act, which provides for the functions of the Central Commission, reads as under:

*“Section 79. Functions of Central Commission: (1) The Central Commission shall discharge the following functions, namely:*

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*\*\*\*\*\*”*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”*

16. Under Section 79(1)(b) of the Act, this Commission is entrusted with the function of regulating the tariff of the generating companies if such generating companies enter into or otherwise have a composite scheme for the generation and sale of electricity in more than one State. Moreover, under Section 79(1)(f) of the



Act, this Commission is entrusted with the function of adjudication upon the disputes involving the generating companies or the transmission licensee with regard to the matter connected with clauses (a) to (d). Hence, the dispute involving the generating companies, which enter into or otherwise have a composite scheme for the generation and sale of electricity in more than one State would fall within the jurisdiction of this Commission.

17. The aspect of 'composite scheme' under Section 79(1)(b) of the Act has been dealt with, in detail, by the Hon'ble Supreme Court in the case of Energy Watchdog v. CERC, [reported as (2017) 14 SCC 80]. The relevant extract of the said judgment is reproduced as under:

*“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 itself in Subsections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in Sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the Appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the Appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.*

*23. This also follows from the dictionary meaning [(Mc-Graw-Hill Dictionary of Scientific and Technical Terms (6th Edition), and P.Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition)] of the expression "composite":*

*(a) "Composite" – "A re-recording consisting of at least two elements. A material that results when two or more materials, each having its own, usually different characteristics, are combined, giving useful properties for specific applications. Also known as composite material.*

(b) 'Composite character'-A character that is produced by two or more characters one on top of the other.

(c) 'Composite unit'-A unit made of diverse elements.

The aforesaid dictionary definitions lead to the conclusion that the expression 'composite' only means 'consisting of at least two elements'. In the context of the present case, generation and sale being in more than one State, this could be referred to as 'composite'.

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

25. The aforesaid dictionary definitions lead to the conclusion that the expression 'composite' only means 'consisting of at least two elements'. In the context of the present case, generation and sale being in more than one State, this could be referred to as 'composite'.

26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a 'composite scheme'. This makes it clear that the expression 'composite scheme' does not have some special meaning, it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

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28. Another important facet of dealing with this argument is that the Tariff Policy dated 6-6-2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28-1-2016 throws considerable light on the expression 'composite scheme', which has been defined for the first time as follows:

"5.11 (j) Composite Scheme: Clause (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

*Explanation.-The composite scheme as specified under Section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located."*

29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the appellant as an indicator that the State Commission has jurisdiction even

*in cases where tariff for inter-State supply is involved. This provision begins with a non obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”*

18. In the above judgment, the Hon’ble Supreme Court has clearly held that the expression ‘composite scheme’ used in Section 79(1)(b) of the Act does not have some special meaning, and it is enough that generating companies have, in any manner, a scheme for the generation and sale of electricity in more than one State. It has also been clearly held that the moment the generation and sale take place in more than one State, the jurisdiction of the Central Commission will be attracted. While returning the aforesaid decision, the Hon’ble Supreme Court has duly considered the provisions of the Tariff Policy, 2016, and further held that the meaning of the word ‘composite scheme’ is nothing more than a scheme by a generating company for the generation and sale of electricity in more than one State. It is also apparent from a bare perusal of the phrase “the enter into or otherwise have a composite scheme for the generation and sale of electricity in more than one State”; that the composite scheme has a wider meaning, i.e., even if the generator has not entered into but otherwise has a scheme for the generation and sale of electricity in more than one State, it is covered under Section 79(1)(b) of the Act. In the instant case, the generator has from time to time, entered into for such supply and sale of electricity in more than one State. Thus, the generator, even if it does not have such a subsisting agreement, it has otherwise a scheme for sale in more than one State.

19. From the above findings of the Hon'ble Supreme Court that it is enough that the generating companies have, in any manner, a scheme for the generation and sale of electricity which must be in more than one State, it can be further inferred that the scheme/ arrangement to generate and sale the power in more than one State, cannot be construed in a limited sense and that the same needs to be liberally construed. As long as the generating company has PPAs/ any other arrangements for the generation and sale of power in more than one State, this Commission has exclusive jurisdiction in the matter of regulation of tariff of a generating company, in terms of the decision of the Hon'ble Supreme Court in the Energy Watchdog Case.

20. Further, in view of the principles laid down in the Energy Watchdog Judgment, the Commission, in its order dated 31.5.2021 in Petition No. 351/MP/2018, in the matter of Petitioner herein i.e., Coastal Energen Private Limited v. TANGEDCO & Anr., also dealt with TANGEDCO's objection of the jurisdiction of this Commission over the Petitioner's Project and overruled such objections.

21. Moreover, in order dated 31.5.2021, which has not been challenged or overruled so far, the Commission has also categorically rejected the contentions of TANGEDCO to link composite scheme with long-term or medium-term PPA or the requirement of having a composite scheme at the time of filing of the Petition since it was also an effort to link composite scheme with term of the PPA. Hence, similar arguments as again raised by TANGEDCO in the present case relating to the short-term nature of the arrangement of inter-State, non-existence of the long-term or medium-term PPAs prior to commercial operation of the Project, etc., are not sustainable.

22. In the present case, it is noticed that the Petitioner, whose generating station is situated in the State of Tamil Nadu, has entered into a PPA with TANGEDCO on 19.12.2013 for the supply of 558 MW for the period of 15 years. Subsequently, the Petitioner entered into a MoU dated 28.11.2015 with the trader, MHPPL, for the sale of 300 MW for the period from January 2016 to December 2018. Under the said MoU, TSPCC issued a Purchase Order to MHPPL for the purchase of the above power to Telangana Discoms from the Petitioner through MHPPL for the period from 5.3.2016 to 26.5.2016. Accordingly, a PPA dated 29.2.2016 was executed between the Petitioner and MHPPL for the sale and purchase of 300 MW for onward sale to TSPCC for the period from 5.3.2016 to 26.5.2016 as and when required basis and for the period from 1.4.2016 to 31.3.2016 on a firm basis. Subsequently, the Petitioner entered into another PPA dated 21.3.2016 with MHPPL for the sale and purchase of 150 MW to onward sale to TSPCC for the period from 27.5.2016 to 25.5.2017 up to the Southern Regional periphery. Thereafter, the Petitioner has also entered into an agreement dated 1.10.2022 with inter-State trading licensee Manikaran Power Limited for the supply of 300 MW power to it for onward supply of power outside the State of Tamil Nadu for a period of one year from the date of signing.

23. The Petitioner has been selling the remaining capacity to other States through various contracts/Lols as enumerated in paragraph 10 of this order. Therefore, the Petitioner meets the criteria of generation and sale of electricity to more than one State. Thus, in light of the aforesaid arrangements in respect of the Petitioner's generating station, we are of the view that, since the Energy Watchdog judgment of the Hon'ble Supreme Court does not establish any qualifying criteria with regard to the term of the contract for a scheme to be classified as "composite scheme," the

Petitioner meets the criteria of the generation and sale of power to more than one State under Section 79(1)(b) of the Act.

24. TANGEDCO has further contended that the test of the 'composite scheme' has to be applied qua each PPA in dispute and not in relation to the generating company. In terms of Section 79 (1) (b) of the Act, which categorically provides that for this Commission to have jurisdiction, the generating companies must enter into or otherwise have a composite scheme for the generation and sale of electricity in more than one State. Therefore, the test of the 'composite scheme' has to be satisfied by the 'generating company'. The expression used in Section 79(1)(b) i.e., 'otherwise', allows 'generating companies' to qualify the test of 'composite scheme' as provided under the Act, in a manner that all inter-State transactions/ arrangements, irrespective of the time period i.e., short/ medium/ long-term executed with the Power Exchange or third party, are qualified under the test of 'composite scheme'. The Hon'ble Supreme Court, in para 26 of the Energy Watchdog judgment, has categorically held that for having a composite scheme, it is enough that "generating companies" have, in any manner, a scheme for the generation and sale of electricity that must be in more than one State. Hence, it is clear that the test of the composite scheme has to be determined vis-à-vis the 'generating company' and not the PPA. In our view, once we have already decided in our order dated 31.5.2021 in Petition No. 351/MP/2018 that this Commission is the Appropriate Commission to decide the case of the Petitioner, there appears to be no case for revisiting the question.

25. Thus, in the light of the above and in terms of the Energy Watchdog Case, we are of the considered view that the Petitioner has a "composite scheme" and, therefore, this Commission has the jurisdiction to adjudicate upon the disputes raised

in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.

26. The issue is answered accordingly

**Issue No. 2: Whether the Petitioner is entitled to Capacity Charges for the alleged period of power supply regulation by it in terms of the PPA dated 19.12.2013 and Ministry of Power's Order dated 28.6.2019 read with subsequent clarifications thereto?**

27. The Petitioner has submitted that in terms of the various Orders/ Notifications/Directives, it was clear that Respondent, TANGEDCO was required to issue an unconditional Letter of Credit (LC) to the Petitioner and that on account of non-payment of the monthly bills and failure to keep the LC for a sufficient amount, the Petitioner was entitled to regulate the power supply to the defaulting entity i.e., TANGEDCO. The Petitioner has further submitted that the aforesaid Orders / Notifications / Directives have a statutory flavour similar to a piece of delegated legislation, which would override the provisions of the PPA dated 19.12.2013 executed between the parties. It has also been stated that the definition of "Law" under the PPA also covers the Orders/ Notifications/ Directions issued by the Ministry of Power and as per Article 15.21 of the PPA, in case of inconsistencies between the agreement and the applicable law including rules and regulations framed thereunder, priority shall be given to the applicable law, rules, and regulations over the provisions of the PPA. Therefore, the MoP directives cannot be ignored and ought to be considered for the purpose of adjudicating the claims of the Petitioner for capacity charges raised in terms thereof. The Petitioner has submitted that despite the continuous default in the performance of its obligations by the TANGEDCO vis-à-vis timely payment of the monthly bill, the Petitioner still ensured the availability of more than 85% at all times and accordingly, as on the date,

TANGEDCO has an outstanding of Rs. 282.63 crore towards capacity charges payable to the Petitioner in terms of availability declared by it during the period of power supply regulations in the financial years 2020-21 and 2021-22.

28. *Per contra*, Respondent, TANGEDCO has submitted that the stance of the Petitioner is wholly untenable considering Article 8.4.11 of the PPA expressly stipulated the amount of LC to be maintained and given, i.e. 1.1 times the average monthly tariff payment of the previous Contract Year and there was no requirement under the PPA to maintain a LC for the entire outstanding dues as alleged by the Petitioner. It is submitted that the Petitioner has not made any case that for the period in question, TANGEDCO has failed to maintain LC at the agreed value of 1.1 times the average monthly payment of the previous Contract Year. TANGEDCO has also submitted that insofar as the arguments relating to the format of LC, not being in accordance with the PPA and MoP Orders, at no stage, the Petitioner had raised any dispute with respect to the format of LC and in fact, from very inception, the format of the LC has remained the same and the Petitioner has accepted the payment throughout without raising any protest with respect to the format of LC. It has also been stated that no steps were taken by the Petitioner towards encashing LC nor it is the case of the Petitioner that it faced any difficulty after having encashed the LC and in any case, the sole ground for purportedly 'regulating' the supply as stated by the Petitioner to the Bill Dispute Notices issued by TANGEDCO was that the LC was inadequate to meet the entire outstanding dues. TANGEDCO has submitted that various directives of the MoP relied upon by the Petitioner require a distribution licensee to maintain the LC in accordance with the provisions of the PPA and the regulation of power supply can only be done if the LC is not maintained in



accordance with the PPA. The MoP Guidelines/directives do not modify the terms of the PPA with respect to the maintenance of LC, and there is no stipulation either in the MoP Guidelines nor in the PPA that a distribution licensee has to maintain the LC for the cumulative outstanding dues for the past period. It has also been submitted that no notice was issued by the Petitioner before the 'regulating' the power supply as required under the Power Supply Regulations.

29. We have considered the rival submissions and have also perused the various documents/information filed on record by the parties. The dispute relates to the claim of the Petitioner for the capacity charges for the availability declared by it for the period during which the Petitioner regulated the power supply of Respondent, TANGEDCO. The concerned period for which the Petitioner purportedly regulated the power supply to Respondent, TANGEDCO, is as under:

<b>Sr.</b>	<b>Month</b>	<b>Period of power supply regulation</b>
1	April, 2020	3 <sup>rd</sup> – 16 <sup>th</sup> April, 2020
2	May, 2020	8 <sup>th</sup> – 31 <sup>st</sup> May, 2020
3	June, 2020	1 <sup>st</sup> – 6 <sup>th</sup> June, 2020
4	August, 2021	21 <sup>st</sup> – 31 <sup>st</sup> August, 2021
5	September, 2021	1 <sup>st</sup> - 4 <sup>th</sup> and 22 <sup>nd</sup> – 30 <sup>th</sup> September, 2021
6	October, 2021	1 <sup>st</sup> – 31 <sup>st</sup> October, 2021
7	November, 2021	1 <sup>st</sup> – 25 <sup>th</sup> November, 2021
8	December, 2021	27 <sup>th</sup> – 31 <sup>st</sup> December, 2021
9	January, 2022	1 <sup>st</sup> – 31 <sup>st</sup> January, 2022
10	February, 2022	1 <sup>st</sup> – 28 <sup>th</sup> February, 2022
11	March, 2022	1 <sup>st</sup> – 26 <sup>th</sup> March, 2022

30. As per the Petitioner, since it continued to declare the availability for the above cited period, the Petitioner raised the invoices for the capacity charges inclusive of the availability declared during the above period, which came to be disputed and withheld by Respondent, TANGEDCO and the total claim made by the Petitioner towards such capacity charges under the present Petition is Rs. 282.63 crore along with carrying cost. Since the entitlement to such capacity charges has

been claimed by the Petitioner primarily on the basis of the orders of the Ministry of Power, it would be relevant to refer the relevant provisions of such orders along with the provisions of the PPA dated 19.12.2013.

31. The Ministry of Power, in its order dated 28.6.2019, observed the need of a robust Payment Security Mechanism required adequacy and validity of the LC to cover the payment due on account of the drawl of power and failure on the part of the distribution licensees to give the LC leading to huge outstanding on account of the unpaid power bill. Consequently, the said order issued the following directions:

*“5.0 It has been seen that despite the above provisions, the Letters of Credit are not being given and there is a huge outstanding on account of unpaid power bills. This makes it difficult for the Generators to pay the fuel, which has to be pre-paid, to continue the generation. The Generators are also required to pay to the Railways in advance for the rakes. If this situation persists, the Generators will not be able to pay for fuel / transportation leading to shortfall in generation of electricity. There will thus be wide spread load shedding on account of lack of generation. It is essential therefore that all the provisions mentioned above are implemented strictly. NLDC & RLDC are therefore directed as follows:*

- i. In accordance with Section 28(3)(a), the NLDC & RLDC shall despatch power only after it is intimated by the Generating Company and Distribution Companies that a Letter of Credit for the desired quantum of power has been opened and copies made available to the concerned Generating Company.*
- ii. The intimation to NLDC and RLDC shall specify the period of supply.*
- iii. RLDC shall dispatch electricity only upto the quantity equivalent to value of Letter of Credit.*
- iv. The dispatch shall stop once the quantum of electricity under LC is supplied.*
- v. The concerned generating company shall be entitled to encash the LC after expiry of grace period i.e. 45 to 60 days as provided in the PPA.*
- vi. In the event power is not dispatched for any reason given above, the Distribution licensee shall continue to pay the Fixed Charge to the Generating Company.*

6. *It shall also be ensured by the Load Despatch Centre that the regulated entity during the period of regulation, has not access to procure power from the Power Exchange and they shall not be granted Short Term Open Access (STOA).*

7. *In case scheduling and despatch of power produced by any generator is not done due to non-opening of Letter of Credit by the Distribution licensee, then the Distribution licensee would be liable to pay compensation to the generator as per the terms of Power Purchase Agreement or Power Sale Agreement, as the case may be, the distribution licensee has entered in with generator.*

8. NLDC/RLDC/SLDC shall carry out such duty case under Electricity Act, 2003 from 01.08.2019....”

32. The aforesaid order was partially modified by the corrigendum dated 17.7.2019 issued by the Ministry of Power wherein term State Load Despatch Centre was also added after the terms “NLDC & RLDC”, wherever they occurred in the Order and points (vii) and (viii), as extracted below, were added in paragraph 5 of the Order.

*“...vii. The LC may be opened as per the PPA. However, the Distribution Company may open LC for a shorter duration say for supply corresponding to one week or fortnight. The same may be intimated to the respective LDCs and the generating company. In such cases also the LDCs shall schedule the power.*

*viii. In case of difficulty in opening of LC, Distribution Company may pay in advance through electronic mode the amount equal to the amount corresponding to at least one day purchases of electricity and inform the same to the respective LDC. In such cases also LDC shall schedule the power to the Distribution Company. ...”*

A bare reading of the above order reveals that by the said order, Load Despatch Centres, namely, NLDC, RLDCs, and SLDCs, were directed to despatch the power only after they had been intimated by the generating companies and distribution companies about an LC for the desired quantum of power had been opened and the copies made available to the concerned generating company. It also provides that in the event the power is not dispatched for the reason given therein (i.e. opening of LC for the desired quantum of power), the distribution licensee shall continue to pay the fixed Charges to the generating company. Clause 5(vi) also enables the distribution licensee to open the LC as per the PPA or open the the LC, even for a shorter duration. Alternatively, distribution licensees were also permitted to pay for supply in advance in lieu of the LC.

33. Thus, the aforesaid order of the Ministry of Power itself permitted the distribution licensee to open the LC as per the PPA. Moreover, it also required a positive intimation from the generating company about a requisite LC having been opened and a copy thereof having been made available to it for the continuation of despatch of the power by the concerned RLDCs/SLDCs. Admittedly, Respondent TANGEDCO, in the present case, had opened LCs for the period in question, albeit there are disputes as to the adequacy as well as the form of such LCs. However, prior to dealing with the rival contentions on these aspects, we may also note that on 17.7.2019, the Ministry of Power also specified a 'Procedure for Scheduling of Power to Distribution Company in the event of Non-maintenance of Letter of Credit' which *inter alia*, elucidated the directives issued under paragraph 5 of the Order dated 28.6.2019. It reiterated that power will be scheduled for despatch only after a written intimation is given to the appropriate Load Despatch Centre (LDC) that the LC for the desired quantum of power has been opened and that the LC may be opened as per the PPA. It also reiterated that in case of non-maintenance of adequate LC or advance payment with respect to the generating station by the distribution company, the power supply from the generating station shall not be scheduled by the appropriate LDC to the concerned distribution company and that during this period of non-scheduling of supply, the generating station shall continue to give scheduling related information as per the Grid Code through the web-based scheduling software on a day-ahead basis. Subsequently, the Ministry of Power issued a clarification to the aforesaid order on 23.7.2019, indicating that LC shall be opened against the power purchases made from 1.8.2019 onwards and that the State-owned generating stations will not be covered under the said order and its subsequent amendments.

On 9.8.2019, the Ministry of Power issued another clarification to the order dated 28.6.2019 and its subsequent amendments, and it clarified as under:

*“.....2. It has been brought to the notice of this Ministry that some Discoms have opened the conditional Letter of Credit, which requires approval from concerned Discom for encashment etc.*

*3. It is hereby clarified that:*

*a. Discoms are obliged to provide unconditional Letters of Credit for power purchases to be made from 01<sup>st</sup> August, 2019 onwards.*

*b. Load Despatch Centre shall get confirmation from the Discoms that required unconditional Letter of Credit has been opened for the power purchase.*

*4. Discoms have to also ensure that the amount of Letter(s) of Credit equals the power purchase requirement for the billing cycle. ....”*

34. Subsequently, the Ministry of Power, by order dated 27.3.2020, in the wake of the Covid-19 pandemic, indicated that the power may be scheduled even if the Payment Security Mechanism is established for 50% of the amount for which the payment is to be otherwise established contractually. The said order was to be in effect till 30.6.2020.

35. Thus, it appears to us that despite the specific directions by the Ministry of Power under the above-referred order(s) casting certain obligations on both sides, such as providing the adequate and non-conditional LCs, intimating the concerned LDCs in the event of non-maintenance of the LCs for the stoppage of dispatch of supply, etc., the despatch of power under the PPA remained unaffected until April, 2020. In other words, the supply under the PPA dated 19.12.2013 continued without any power supply regulation. There is also no documents/information filed on record by the Petitioner indicating whether the Petitioner had confirmed with the concerned LDCs regarding the adequacy of the LC as furnished by the TANGEDCO, including its grievance relating to its form and, consequently, the continuation or stoppage of

despatch to TANGEDCO under the PPA prior to opting for the exercise of regulation of supply beginning from April 2020. The only document that may give an indication as to the exercise of regulation of supply by the Petitioner for the months of April – June, 2020 as placed on record, are the replies/responses of the Petitioner to the Bill Dispute Notices issued by TANGEDCO. In response to the Bill Dispute Notices issued by TANGEDCO dated 28.5.2020 and 30.6.2020, pointing out that discrepancies in the capacity charges, the Petitioner by its response dated 3.7.2020 had indicated as under:

“ .....

1. Your kind attention is drawn to the MOP order/directive cited in Ref. No. 6&7, where MOP has directed all the DISCOMs for opening the LC and also to ensure maintaining 100% LC against the energy scheduled. As per the said order, the Generators are entitled to get the fixed charges, in case power is not despatched due to non-availability of sufficient LC.
2. Subsequent to the MOP directives referred under Sr. no.7, TANGEDCO opened the Letter of Credit (LC) as a Payment Security Mechanism (PSM) under LT PPA, for Rs. 43.07 Cr on 30.7.2019 which was enhanced to Rs. 129.21 Cr. vide amendment dated 19.8.2019.
3. Thereafter in wake of Covid crisis, MoP relaxed the condition of LC to 50% of the value till 30<sup>th</sup> June, 2020 vide order dated 06<sup>th</sup> Apr, 2020.
4. The table below shows the LC available for the various days.

Month	Bill Amount (Rs in Crs)	Due date	Receipt Amount (Rs. In Crs)	Receipt date	% LC available
Feb'20	159.70	02.04.20	31.94	17.04.20	1-16 April -0%
			47.91	27.05.20	17-30 April - 25%
Mar'20	158.50	02.05.20	47.55	08.05.20	1-31 May – 0%
April'20	123.26	03.06.20	Not received	NA	1-30 June – 0%

From the above table it can be seen TANGEDCO neither made sufficient payment nor maintained adequate LC during the months of April, May and June'20, owing to which we are not able to schedule the power which resulted into huge loss.

We are entitled to receive fixed charges as per the aforesaid MOP directives and as per the LT PPA, as power could not be supplied due to non-receipt of

*payment and non-maintenance of adequate LC. Hence, we request you to immediately release the withheld amounts of Rs. 35.69 Cr against our monthly bills of Apr, 2020 and May, 2020.*

36. Further, after the period from April 2020 to June 2020, no supply regulation was undertaken by the Petitioner on the ground of non-adequacy of the LC until August 2021, and the reason for the above has been indicated by the Petitioner in the Petition as “...until August, 2021, the Petitioner declared availability and also supplied power to the Respondent/ TANGEDCO as significant payments were being released by the Respondent/ TANGEDCO, which enabled the Petitioner to operate the plant.” This, in our view, indicates an inconsistent approach on the part of the Petitioner. If the Petitioner had any grievance in relation to the form or adequacy of the LC furnished by Respondent, TANGEDCO, it ought to have reported/intimated so to the concerned LDCs. Rather, the Petitioner appears to have given a complete go by to the very directives of the Ministry of Power on which it is relying upon to justify the action of power supply regulation and claim of the capacity charges at its convenience. From August, 2021, the Petitioner again stopped scheduling for the various periods up to the month of March, 2022 as noted above and it appears that the same was informed by the Petitioner to Respondent, TANGEDCO in response to the various Bill Dispute Notices issued by TANGEDCO in relation to the Petitioner’s capacity charges claims. The Petitioner’s response dated 4.10.2021 to TANGEDCO’s Bill Dispute Notice for the month of August, 2021 is reproduced below:

“ .....

*CEPL’s reply to the TANGEDCO’s notice is as below:*

*1. Your kind attention is drawn to the MOP order/directive cited in Ref. 4, where MOP has directed all the DISCOMs for opening the LC and also to ensure maintaining 100% LC against the energy scheduled. The relevant extract of the aforesaid order is as below:*

5(i). In accordance with Section 28(3)(a), the NLDC & RLDC shall despatch power only after it is intimated by the Generating Company and Distribution Companies that a Letter of Credit for the desired quantum of power has been opened and copies made available to the concerned Generating Company.

ii. The intimation to NLDC and RLDC shall specify the period of supply.

iii. RLDC shall dispatch electricity only upto the quantity equivalent to value of Letter of Credit.

iv. The dispatch shall stop once the quantum of electricity under LC is supplied.

v. The concerned generating company shall be entitled to encash the LC after expiry of grace period i.e. 45 to 60 days as provided in the PPA.

vii. In the event power is not dispatched for any reason given above, the Distribution licensee shall continue to pay the Fixed Charge to the Generating Company.

2. TANGEDCO has opened the Letter of Credit (LC) as a Payment Security Mechanism (PSM) under LT PPA for Rs.136.29 Cr.

3. As on 21.08.2021, the value of LC maintained by TANGEDCO was Rs. 136.29 Cr. whereas the outstanding from TANGEDCO was Rs. 483.76 Cr against the monthly Invoices from Mar'21 to June'21. This clearly indicates the said LC issued by TANGEDCO does not cover the supply for the period 21<sup>st</sup> to 31<sup>st</sup> Aug'21.

It is evident from the above that the conditions prescribed by MOP was not met by TANGEDCO as it has neither made the advance payment to CEPL nor enhanced the LC to cover the power supply.

Therefore, we are entitled to receive fixed charges in compliance with the MOP directive. Hence, we request you to immediately release the withheld amount of Rs. 3.09 Cr against our monthly bill of Aug'21....”

37. The above similar replies were issued by the Petitioner on 26.10.2021, 15.12.2021, 4.3.2022, 23.3.2022, and on 29.4.2022 in response to Respondent, TANGEDCO's Bill Dispute Notices for the monthly invoices for the period from September, 2021 to March, 2022. A careful perusal of all the above replies indicates that the sole ground, as communicated by the Petitioner for the stoppage of scheduling and claiming the capacity charges for the declared availability in terms of the Ministry's order, had been that the LC issued by TANGEDCO did not cover the outstanding amount for the period from March 2021 to June 2021. Further, since the Respondent neither made the advance payment nor enhanced the value of LC to cover the power supply, the Petitioner was entitled to receive the fixed charges in compliance with the directives of the Ministry of Power (for the period of non-



scheduling). Conspicuously, in none of these letters issued at the relevant period, the Petitioner had raised any dispute/objection as to the form of LC i.e. condition stipulated therein made it conditional, which was not in accordance with the PPA and/or directives issued by the Ministry of Power as prominently raised in the Petition and argued during the course of the hearing.

38. Now, dealing with both the objections (adequacy as well as form) relating to the LC furnished by Respondent, TANGEDCO, we may start with the objection relating to the adequacy of the LC since it had, as noted above, been the sole ground communicated to Respondent, TANGEDCO for the stoppage of scheduling at the relevant point of time. According to the Petitioner, LC furnished by the TANGEDCO was inadequate for the purpose of servicing the huge outstanding amount that had accrued from the Respondent. However, as rightly pointed out by Respondent, in none of the directives issued by the Ministry of Power under the order dated 28.6.2019 the distribution licensee was required to furnish the LC for an amount that would cover the outstanding entirely. As already noted above, the said order permitted the distribution licensee to furnish the LC as per the PPA, and insofar as the quantum of the LC required to be maintained under the PPA dated 19.12.2013 Article 8.4.11 of the PPA provides as under:

*“...8.4.11 Stand by Letter of Credit*

*8.4.11.2 The Procurer shall open a Stand by Letter of Credit through a Scheduled Bank at Chennai, India in favour of the Seller, to be made operative from a date prior to the Due Date of its first Monthly Bill under this agreement. The Stand by Letter of Credit shall have a term of twelve (12) months and shall be renewed annually, for an amount equal to:*

*I) for the first Contract Year, equal to one point one (1.1) times the estimated average Monthly billing based on Normative Availability;*

*II) for each subsequent Contract Year, equal to one point one (1.1) times the average of the monthly tariff payment of the previous Contract Year...”*



39. As such, we notice that the Petitioner has not raised any argument / dispute to the effect that the amount under the LC, as given by TANGEDCO, had not been in accordance with the amount to be worked out as per the above Article. The argument of the Petitioner that as per the directives of the Ministry of Power under an order dated 28.6.2019, the LC ought to cover the entire outstanding does not hold any merit. As already noted above, the said directives clearly permitted the distribution licensee to open the LC as per the PPA. In any case, the directives clearly permitted that the despatch of the power to the amount equivalent to the LC value, whereas in the present case, the regulation of supply had been at certain instances for almost the entire month despite there being an LC for an amount corresponding to a billing cycle as per the provisions of the PPA. Clearly, the Petitioner had sought to equate the adequacy of the LC with the outstanding dues that had already accrued and were pending clearance on the part of the Respondent. Such an approach, in our view, is misdirected and does not flow from the Ministry of Power's directives relied upon by the Petitioner. It is equally important to note that in the event of the failure of Respondent to clear the outstanding dues for any particular month within the stipulated period, the generating company was given the liberty to encash the LC furnished by the distribution licensee. However, in the event that the generating company does not opt for such course, it cannot insist upon the distribution licensee to increase the LC amount to cover the outstanding past dues as well. The action of not opting for encashment of the LC and continuing to supply the power to the distribution licensee is a commercial choice of the generator, taken entirely on its own perils, and it cannot cast any corresponding obligation upon the distribution licensee to enhance the value of the LC. Hence, the non-scheduling of supply of power by the Petitioner, on the ground that the

Respondent has failed to enhance the value of LC to cover the outstanding dues, in other words, inadequacy of the LC amount, deserves to be rejected.

40. This brings us to the second leg of the objection raised by the Petitioner in support of the purported action of power supply regulation and the consequent, claim of the capacity charges. The Petitioner has pointed out that as per the stipulation mentioned in the LC, it required a *“Bill of Exchange or Draft duly Accepted by TANGEDCO”* for its encashment-thereby making the LC a conditional one and, therefore, not in accordance with the provisions of the PPA as well as the Ministry of Power’s directives. We have perused the provisions of the LC and find that the said stipulation would require an intervention of Respondent TANGEDCO (acceptance of Bill of Exchange / Draft by it) for its encashment by the Petitioner. The Commission also had an opportunity to examine the similar stipulation in LC furnished by TANGEDCO in its order dated 5.1.2024 in Petition No. 234/MP/2022 in the matter of PTC India Limited v. TANGEDCO and Anr., wherein the Commission has clearly held that insertion of such clause would make the LC a conditional one. In the present case, the provisions of the PPA dated 19.12.2013, as such, do not clearly spell out that standby LC to be furnished shall be an unconditional one, but keeping in view the documents required to be presented to the scheduled bank to draw upon such LC, it is fair to say that only an unconditional LC would serve the purpose of payment security mechanism as the conditional LC from the defaulting distribution licensee might amount nothing more than a false sense of the security. Moreover, the Ministry of Power’s directives, in particular, clarification dated 9.8.2019, also clearly spelt out that distribution licensees were obliged to provide the unconditional LC for the supply of power, and in the present case, evidently, Respondent TANGEDCO has failed to provide the unconditional LC to the Petitioner herein. It is

noted that the Petitioner has raised the plea of the LC furnished by TANGEDCO being a conditional one and, as such, violative of MoP's directives and the provisions of the PPA, in the pleadings and during the course of the hearing. However, it is noticed from the contemporaneous correspondence placed on record by the Petitioner that the Petitioner never raised the issue of conditional LC while stopping the scheduling and claiming the capacity charges for the declared availability. Despite having raised such a plea, the Petitioner has failed to indicate any correspondence wherein it had raised any objection to the form of LC or had made any attempt to invoke the LC against the outstanding dues and such attempt could not be fructified on account of such stipulations. We notice that the Petitioner, in the Petition, has stated that *"...8. In terms thereof, it is most vital to place on record before this Commission that the Petitioner, on various occasions, vide its letters dated 03.07.2020, 04.10.2021, 26.10.2021, 15.12.2021, 04.03.2021, 23.02.2022 and 29.04.2022 requested the Respondent/ TANGEDCO to provide an unconditional LC in terms of the PPA and order/clarification issued by the MoP."* A similar statement has also been made in the written submissions, wherein it has been stated that *".....(g) Accordingly, the Petitioner, on various occasions, issued letters to the TANGEDCO to provide an unconditional LC in terms of Article 8.4 of the PPA as well as the MoP Notification dated 09.08.2019 [P-9, P-11, P-13, P-17, P-21, P-23 & P-26 @ Pg. 237-238, 240-241, 243-244, 251-252, 259-260, 263-264, 269-271 of the pleadings].* The reference to the various letters made in the written submissions are the letters issued by the Petitioner in response to the various Bill Dispute Notices issued by Respondent, TANGEDCO and one of such letter dated 4.10.2021 (P-11) has already been quoted above. Even perusal of the other responses indicates that in none of these letters, the Petitioner has raised a plea of LC being conditional one

and all of such letters raise the grounds of the amount under LC being not sufficient to supply the power for the concerned period. The Petitioner in its written submissions has indicated that it was unable to encash the LC on 2.8.2022 (whereby the Bill of Exchange was rejected since it was not accepted by TANGEDCO) and in July, 2023 (whereby TANGEDCO proceeded to make the payment against the bills presented under LC while the same was being processed by the Bank). Not only such submissions are bereft of any supporting documents, the period indicated therein is much later to the period in question. In fact, by the said time, the Petitioner was already operating under the Section 11 regime and not under the terms and conditions of the PPA. Thus, having not raised the plea of LC being conditional one at the relevant time while undertaking the regulation of power supply, the Petitioner cannot be permitted to justify its action and claims on a plea that has been raised for the very first time in the Petition itself. The approach and conduct of the Petitioner, as can be seen from the above, clearly indicated that at no point in time prior to the filing of the present Petition, had any issue with the form of LC, which it brought to the notice of Respondent, TANGEDCO.

41. In view of the foregoing observations, we find and hold that the action of the Petitioner to regulate the power supply to Respondent TANGEDCO on the ground of inadequacy of LC by not enhancing the LC amount to include outstanding dues of the Petitioner is not in line with the Payment Security Mechanism directives of the Ministry of Power. Therefore, the Petitioner's action is not tenable, and accordingly, the claim for the capacity charges during such period must also fail.

42. In view of the above observations, the present Petition stands disposed of.

Sd/-  
**(P.K.Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

sd/-  
**(Jishnu Barua)**  
Chairperson

