

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 122/MP/2022

Coram:

**Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V., Member
Shri Harish Dudani, Member**

Date of order: 1st July, 2025

IN THE MATTER OF:

Petition under Section 79 of the Electricity Act, 2003 read with Clause 18.11 (g) of the Request for Proposal for purchase of power bearing Tender Specification No. 24/SPATC-155/2015 dated 22.12.2015 and read with terms and conditions of the Letter of Intents dated 18.01.2016, 28.01.2016 and 30.01.2016 issued by Uttar Pradesh Power Corporation Ltd. (UPPCL) to Tata Power Trading Company Ltd. seeking direction of payment of late payment surcharge on account of delay by UPPCL in honouring the invoice(s) raised by Petitioner in terms of Order dated 17.09.2018 in Petition No. 158/MP/2017 issued by this Commission.

AND

IN THE MATTER OF:

Jindal India Power Limited,
(*erstwhile* Jindal India Thermal Power Ltd.)
Habitat India, C-3
Qutab Industrial Area, Katwaria Sarai,
New Delhi- 110016

...Petitioner

Versus

1. **Uttar Pradesh Power Corporation Limited,**
14th Floor, Shakti Bhawan Extension,
Ashok Marg, Lucknow- 226001
2. **Tata Power Trading Company Limited,**
Corporate Centre, 34th Sant Tukaram Road,
Carnac Bunder, Mumbai- 400009

...Respondents

Parties present:

Shri Aniket Prasoon, Advocate, JITPL
Shri Aman Sheikh, Advocate, JITPL
Shri Vinit Kumar, Advocate, JITPL
Ms. Archita Kashyap, Advocate, JITPL
Shri Adarsh Kumar, Advocate, JITPL



Shri Shubham Singh, Advocate, JITPL
Ms. Sanjeevani Mishra, Advocate, JITPL
Ms. Rashmi Vaish, Advocate, JITPL
Shri Venkatesh, Advocate, TPTCL
Shri Suhel Buttan, Advocate, TPTCL
Shri Vedant, Advocate, TPTCL
Shri Abhishek Kumar, Advocate UPPCL

ORDER

The Petitioner, Jindal India Power Limited ('Petitioner/JITPL') [*erstwhile* Jindal India Thermal Power Limited] has filed the present Petition under Section 79 of the Electricity Act, 2003 ('Act') *inter alia* seeking direction against Uttar Pradesh Power Corporation Ltd. ('Respondent No. 1/ UPPCL') for recovery of the Late Payment Surcharge ('LPS') to the Petitioner on account of delay in releasing the payment qua the differential amount on account of increase in Clean Environment Cess ('CEC') in terms of Clause 18.11(g) of the Request for Proposal for purchase of power bearing tender specification No. 24/SPATC-155/2015 dated 22.12.2015 ('RfP').

2. The Petitioner has made the following prayers:

"a. Direct the Respondent No. 1, i.e., UPPCL to pay the claim of Rs. 5,90,52,713/- (Rupees Five Crore Ninety Lakhs FiftyTwo Thousand Seven Hundred Thirteen Only) as on 16.04.2022 (or actual amount as per the date of payment) to the Petitioner i.e., JITPL towards late payment surcharge on account of delay in releasing the payment qua the differential amount on account of increase in Clean Environment Cess in terms of Clause 18.11(g) of the RfP, on the basis of the documents submitted by the Petitioner;

b. in the interim:

(i) Direct Respondent No. 1 i.e., UPPCL to release payment of 75% of the amount due i.e., 4,42,89,534.75, against the invoices raised by Petitioner in terms of Order dated 05.11.2018 read with Corrigendum dated 03.12.2018 passed by this Commission in Petition No. 159/MP/2017;

c. Award costs of these proceedings against Respondent No. 1 and in favour of the Petitioner; and

d. Grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner."

Factual matrix:

3. Brief facts necessary to appreciate the issues in the present case, as noted in the Petition, are as under:

(a) The Petitioner/JITPL is a generating company within the meaning of Section 2(28) of the Act and operates a coal-based Thermal Power Station of 1200 MW (2 x 600) at Derang, Angul District in the State of Odisha (the 'Project').

(b) Respondent No. 1/ UPPCL is a distribution licensee in the State of Uttar Pradesh and is overseeing the distribution and supply of electricity for and on behalf of distribution companies. Respondent No. 2/ TPTCL is an inter-State trading licensee under the provisions of Section 2(26) of the Act.

(c) The competitive bidding process was initiated by the Respondent UPPCL, thereby issuing the RfP for selection of a successful bidder for supplying firm power on a short-term basis for the period from 1.5.2016 to 30.9.2016. TPTCL participated in the said bidding process and was selected as the successful bidder to supply power from the Project.

(d) Accordingly, pursuant to discussions between the parties, UPPCL issued the following Letters of Intent (Lols) to TPTCL for the supply of power from the Petitioner's Project. As per the Lols issued by UPPCL, the terms and conditions of the RfP were applicable to the abovementioned supply of power by the Petitioner to UPPCL through TPTCL.

(i) Letter of Intent dated 18.1.2016 ('Lol dated 18.1.2016') for supply of 200 MW during May - June 2016 and August - September 2016 at landed rate of Rs. 2.60 per kWh at the Delivery Point (i.e., U.P. State Periphery);

(ii) Letter of Intent dated 28.1.2016 ('Lol dated 28.1.2016') for supply of additional power of 110 MW from May 2016 – June 2016, 130 MW power in August 2016, and 200 MW power in September 2016;

(iii) Letter of Intent dated 30.1.2016 ('LoI dated 30.1.2016') for supply of additional 125 MW power at Rs. 2.99 per kWh in June 2016 and August 2016.

(e) Clause 18.11(c) of the RfP pertains to Change in Law, which includes any change in taxes, duties, cess or introduction of any tax, duty, cess made applicable for the supply of power by the Petitioner. Furthermore, Clause 18.11(g) of the RfP pertaining to billing provides that the LPS at a rate of 1.25% per month will be levied on all remaining dues, that have been pending for more than 30 days from the date of submission of the bill.

(f) After issuance of the Lols, the Ministry of Finance, through its notification dated 29.2.2016 ("Notification dated 29.2.2016"), renamed the Clean Energy Cess as Clean Environment Cess (CEC) and increased the levy of the same from Rs. 200/tonne to Rs. 400/tonne with effect from 1.3.2016. Accordingly, the Petitioner issued Change in Law notices under Clause 18.11(c) of the RfP to TPTCL, claiming compensation for the resultant increase in coal cost, which was in turn, issued to UPPCL by TPTCL. However, UPPCL did not respond to the same. Consequently, the Petitioner and TPTCL jointly filed a Petition No. 158/MP/2017 before the Commission seeking a Change in Law compensation on account of the increase in the rate of CEC by virtue of Notification dated 29.2.2016.

(g) The Commission, *vide* order dated 17.9.2018 in Petition No. 158/MP/2017, held that the increase in CEC by virtue of the Notification dated 29.2.2016 constituted a Change in Law event under Clause 18.11(c) of the RfP and directed that the Petitioner and TPTCL be compensated at Rs. 200/tonne, proportionate to the coal consumed for supply of power for the period from May to September 2016, or as per the applicable operational parameters, whichever is lower.

(h) On 25.9.2018, TPTCL communicated UPPCL regarding the order passed by the Commission on 17.9.2018, along with an invoice dated 13.1.2017 for an amount of Rs. 4,84,37,282/- towards the differential CEC for power supplied between 1.5.2016 and 30.9.2016. In response, UPPCL, by way of its

letter dated 4.10.2018, requested supporting documentation, including an Auditor's Certificate.

(i) Thereafter, the Petitioner, *vide* its letter dated 1.11.2018, intimated TPTCL that due to an increase in the amount of CEC, it had incurred a cost of Rs. 5,12,83,977/- towards CEC as per actual coal consumption and Rs. 5,28,08,952/- as per the operational parameters. By way of the said letter, the Petitioner, in terms of the Commission's direction in the Order dated 17.9.2018, requested TPTCL to recover the payment of Rs. 5,12,83,977/- from UPPCL. In addition, *vide* the said letter, the Petitioner also provided the requisite documents which *inter alia* included the Auditor's Certificate, computation as per actual coal consumption and operational parameters in accordance with the applicable tariff regulations, details of the energy supplied at Ex-bus for UPPCL, Coal GCV data for the Lol period, Grid Report, and the proof of payment made by the Petitioner. TPTCL *vide* letter dated 2.11.2018, reiterated the above-mentioned claim of the Petitioner to UPPCL and sought the release of the payment along with the applicable surcharge.

(j) Thereafter, TPTCL sent several reminders to UPPCL, and the Petitioner also requested TPTCL to coordinate with UPPCL for the release of payment along with the applicable surcharge. However, no response was received from UPPCL.

(k) Subsequently, a virtual meeting was held on 27.10.2020 amongst the parties, following which the Petitioner *vide* its email 4.11.2020 clarified that the dues payable under the Order dated 17.9.2018 could not be waived and that the issue pertaining to the waiver of Late Payment Surcharge (LPS) would be taken up with its management separately, after the payment of the principal amount by UPPCL. The same was duly informed to UPPCL by TPTCL through a letter dated 05.11.2020.

(l) Subsequently, UPPCL *vide* letter dated 7.12.2020 sought confirmation from TPTCL that no LPS would be claimed on the principal amount in order to process the payment. TPTCL, *vide* its letter dated 8.12.2020, conveyed this request to the Petitioner. In response, the Petitioner *vide* letters dated 17.12.2020

and 6.2.2021 reiterated that the principal amount ought to be paid immediately, and the issue pertaining to waiver of the LPS amount would be taken up by the management thereafter.

(m) Thereafter, UPPCL made payment of the Change in Law claim on 24.5.2021. Subsequently, the Petitioner *vide* its letters dated 4.6.2021 and 11.10.2021 requested TPTCL to arrange for payment of LPS from UPPCL in terms of Clause 18.11(g) of the RfP for the delay in payment of the CIL Claim. Accordingly, TPTCL *vide* its letters dated 7.6.2021, 13.10.2021, and 8.12.2021 requested UPPCL to arrange for the release of LPS in terms of Clause 18.11(g) of the RfP due to the delay in releasing the Change in Law claim. However, UPPCL did not respond to the aforesaid letters.

Proceedings before the Commission

Hearing dated 29.7.2022

4. The Commission admitted the Petition on 29.7.2022, and the notice was issued to the parties for filing their respective replies. In compliance with such directions, the Respondents, UPPCL and TPTCL, filed their replies to the Petition on 16.8.2022 and 22.8.2022, respectively. The Petitioner has also filed its rejoinders to the replies filed by UPPCL and TPTCL.

Submissions of the Respondent No. 1 (UPPCL)

5. Respondent No. 1, UPPCL *vide* its preliminary reply dated 16.8.2022, has mainly submitted as under:

a. The Petition is not maintainable and liable to be dismissed. The Petitioner has failed to disclose the contractual arrangement between the Petitioner and TPTCL, the trading licensee through whom the energy was procured by UPPCL. Further, any claim towards LPS by the Petitioner can only arise, if at all, from its agreement with TPTCL. Therefore, unless and until the

Petitioner establishes that LPS is contractually payable by TPTCL, no claim can be sustained against UPPCL.

b. Further, the Petitioner has suppressed material facts and documents, including the terms of its agreement with TPTCL. In this context, it was highlighted that the Petitioner, by way of its debit note dated 01.11.2018, has not made any claim towards the LPS, and even the subsequent debit note dated 02.11.2018 from TPTCL vaguely refers to LPS being applicable.

c. In support of its contentions regarding suppression of material facts, UPPCL relied on the Judgment of the Hon'ble Supreme Court in the case of *K.D. Sharma v. Steel Authority of India Ltd.*, [(2008) 12 SCC 481], wherein the Court emphasized that a litigant invoking the jurisdiction of a court must disclose all material facts fully and fairly, and observed that suppression of material facts amounts to abuse of process and disentitles the party from any relief. Further reliance was placed on *Dalip Singh v. State of U.P.*, [(2010) 2 SCC 114], where the Hon'ble Supreme Court held that litigants, who attempt to mislead or suppress facts, are not entitled to relief. Additionally, the judgment of the APTEL dated 27.5.2019, in Appeal No. 202 of 2018 in the case of *JVVNL & Ors. v. RERC & Anr.*, also reiterated that misleading the tribunal through suppression warrants dismissal of the plea.

d. The Petitioner has failed to meet the settled legal tests for the grant of interim relief, i.e., the Petitioner has neither demonstrated a *prima facie* case, nor shown any irreparable injury, nor established that the balance of convenience lies in its favour. Reliance was placed on the case of *Dalpat Kumar v. Prahlad Singh*, [(1992) 1 SCC 719].

Submissions of Respondent No.2/ TPTCL

6. Respondent No. 2/ TPTCL, vide its reply dated 22.8.2022, has mainly submitted as under:

(a) TPTCL has acted as an intermediary Inter-State trading licensee facilitating the sale of power from the Petitioner to UPPCL pursuant to Lols

issued by UPPCL under its competitive bidding process initiated through the RfP. TPTCL was selected as the successful bidder, and supply was carried out from the Petitioner's generating station to UPPCL for specified months in 2016.

(b) Although no formal Power Purchase Agreement ('PPA') was executed between TPTCL and the Petitioner, nor a Power Sale Agreement ('PSA') with UPPCL, the Lols being accepted and acted upon by all parties gave rise to a legally binding arrangement, as confirmed in the Commission's order dated 17.9.2018 in the CIL Petition. In that order, the Commission had *inter alia* held that despite the absence of formal contracts, the conduct of the parties established a binding legal relationship and that the Petitioner was entitled to claim Change in Law compensation directly from UPPCL for the increased CEC in terms of Clause 18.11(c) of the RfP.

(c) In addition, TPTCL highlighted the various communications, which were sent to UPPCL requesting payment of the LPS, including letters dated 7.6.2021, 13.10.2021, and 8.12.2021.

Rejoinder of the Petitioner to the submissions of Respondent No. 1/ UPPCL

7. The Petitioner, in its rejoinder dated 12.9.2022, has mainly submitted as under:

(a) The claim of the Respondent UPPCL that the Petitioner has suppressed its contractual arrangement is misplaced, as the Commission, in its order dated 17.9.2018, had already considered and acknowledged the back-to-back nature of the arrangement involving the Petitioner, TPTCL, and UPPCL. The Commission, in the aforementioned order, has held that a binding contractual relationship existed based on the Lols and recognized the nexus between the Petitioner and UPPCL, notwithstanding the intermediary role of TPTCL.

(b) The claim for LPS arises due to a substantial delay in the release of the principal amount by UPPCL, which was released only in May 2021, i.e., approximately 32 months after the Commission's Order dated 17.9.2018 and about 58 months from the date of the original invoices. As per Clause 18.11(g)

of the RfP, LPS is payable for any dues that remain unpaid beyond 30 days from the date of submission of the bill, at the rate of 1.25% per month.

(c) In response to UPPCL's contention that the Petitioner must first demonstrate its right to LPS from TPTCL before making a claim on UPPCL, the Commission has already established a direct contractual nexus between the Petitioner and UPPCL. Furthermore, UPPCL itself has acted upon the Commission's earlier order by releasing the principal amount to the Petitioner; and therefore, it cannot contest the underlying contractual framework that was already adjudicated.

(d) In addition, the Petitioner has placed on record the several communications issued by both the Petitioner and TPTCL between 2019 and 2020, requesting UPPCL to release the principal dues along with the applicable LPS. TPTCL vide its letter dated 28.01.2019, initially raised a demand of Rs. 5.12 crores from UPPCL along with LPS and further followed up through its subsequent letters dated 13.02.2019 and 12.04.2019, reiterating the demand and also the Commission's earlier directions. Thereafter, the Petitioner, vide its letter dated 18.02.2020, informed TPTCL that the accrued LPS had increased to Rs. 1.12 crores, which was then communicated by TPTCL to UPPCL through its letter dated 19.02.2020. Subsequently, the Petitioner, vide letter dated 16.09.2020, intimated TPTCL of a further escalation in the LPS amount to Rs. 3.12 crores, which was again conveyed by TPTCL to UPPCL in its letter dated 17.09.2020.

(e) The aforementioned letters clearly demonstrate that LPS was claimed well in advance and that the matter was consistently pursued. It is also pointed out that although UPPCL did not raise specific objections to the above communications, it did request a waiver of LPS prior to releasing the principal amount, which indicates acknowledgment of its liability to pay the LPS.

(f) Relying upon the recommendations of the High-Level Empowered Committee (HLEC), which was later endorsed by the Cabinet Committee on Economic Affairs (CCEA) and the Ministry of Power, also stressed upon the importance of timely payment and the mandatory nature of LPS as a measure to address the financial stress in the power sector.

(g) Further, the LPS component represents compensation for the time value of money and is essential for restoring the Petitioner to the same economic position it would have been, if had the payment been made in a timely manner, consistent with the established regulatory principles relating to restitution under a 'Change in Law' event.

Hearing dated 19.7.2023

8. *Vide* Record of Proceedings for the hearing dated 19.7.2023, the Petitioner was directed to file additional documents including a copy of the Minutes of Meeting held on 27.10.2020, communications exchanged with regard to the waiver of LPS during the periods from 27.10.2020 to 24.5.2021 and 24.5.2021 to 16.4.2022, relevant clauses of Lols and Order dated 5.11.2018 in arriving at effective date considered in computation of LPS and details regarding levy of carrying cost on the LPS along with relevant clauses of Lols and Order dated 5.11.2018 by way of an affidavit. TPTCL and UPPCL were directed to submit affidavits detailing the communications exchanged regarding the levy and waiver of the LPS.

9. In compliance with the Commission's direction, TPTCL filed its affidavit dated 28.7.2023, stating that it had requested UPPCL to release the payment of LPS amounting to Rs. 3.60 crores by way of its letter dated 7.6.2021. Thereafter, through its letters dated 13.10.2021 and 8.12.2021, TPTCL again requested UPPCL for payment of the LPS.

10. The Petitioner also filed its compliance affidavit dated 17.8.2023, and has mainly submitted as under:

(a) The meeting held on 27.10.2020 was conducted virtually, and no signed minutes of the meeting were issued. However, the Petitioner, by way of a follow-up email dated 4.11.2020, conveyed that the Change in Law dues could not be

waived as they were based on the Commission's Order dated 17.9.2018 in the CIL Petition, and any decision regarding the waiver of LPS would be taken at a later stage.

(b) The Petitioner affirmed that it had never waived its right to claim the carrying cost or LPS. Several letters and emails from both the Petitioner and TPTCL to UPPCL consistently requesting payment of dues with applicable LPS show the ongoing efforts to enforce this right before and after the meeting on 27.10.2020.

(c) Clause 18.11(g) of the RfP mandates LPS on dues unpaid for over 30 days. Since the invoices claiming differential CEC were issued between June and October 2016, LPS is claimed from 30 days after each invoice date.

(d) Further, with regard to the levy of carrying cost on the LPS, interest is due as per Clause 18.11(g) since LPS amounts also remained unpaid beyond 30 days. Reliance is placed upon the *Hyder Consultancy (UK) Ltd. v. Governor, State of Orissa* reported as [(2015) 2 SCC 189] and other settled principles of law by the APTEL in the Appeal No. 386 of 2019, titled *Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Anr.* and the Hon'ble Supreme Court's Order in Civil Appeal No.6440 of 2021 i.e., the appeal arising from the aforesaid judgment.

a. The Commission *vide* order dated 9.8.2023 in Petition No. 173/MP/2022 (*Sembcorp Energy India Ltd. v. APPCC & Ors.*) (hereinafter referred to as '*SembCorp case*'), allowed carrying cost on pending LPS until actual payment. In the present case, given the 58-month delay from invoice issuance in receiving the principal amount, the Petitioner is similarly entitled to interest on the delayed LPS till the date of actual payment.

Hearing dated 18.8.2023

11. During the course of the hearing, the Petitioner, submitted that despite the Commission's directions in its order dated 17.9.2018 regarding the payment of Change in Law claims towards increase in rate of CEC, UPPCL released the principal

amount only on 24.5.2021 after a significant delay of 32 months from the date of the Order dated 17.9.2018, and the Petitioner had never waived its right to claim the LPS. In view of the same, UPPCL sought time to file an affidavit, stating that the necessary documents were submitted by the Petitioner only in April 2021, and payment was made thereafter in May 2021. UPPCL also requested a further oral hearing, whereas TPTCL confirmed that it had already filed its affidavit in compliance with earlier directions.

12. The Commission permitted UPPCL to file its affidavit, and the Petitioner was directed to file its response thereon along with the details of CEC and LPS invoices, internal decisions regarding LPS waiver, and the relevant agreement with TPTCL.

13. In compliance with the directions of the Commission, the Respondent No.1/UPPCL filed its additional affidavit dated 7.9.2023, and has mainly submitted as under:

(a) The Petitioner, as well as TPTCL, did not raise any claim for the LPS during the earlier proceedings in the CIL Petition, and no such relief was granted by the Commission in its order dated 17.9.2018. Further, the claim for LPS is an afterthought, and that the present Petition is barred by principles of *constructive res judicata* and Order II Rule 2 of the CPC, and reliance was placed upon the judgments of the Hon'ble Supreme Court in *CIT v. T.P. Kumaran*, [(1996) 10 SCC 561] and *State of Punjab v. Krishan Dayal Sharma*, [(2011) 11 SCC 212].

a. As per the Commission's directions in the Order dated 17.9.2018, the Petitioner and TPTCL were required to furnish invoices along with proof of payment and an Auditor Certificate to enable reconciliation of claims. The same was provided by the Petitioner to UPPCL only on 8.4.2021. Thereafter, upon receiving the complete documentation, it verified the claim within 30 days and

released payment on 24.5.2021. Therefore, there was no delay on the part of UPPCL to comply with its obligations as per the Order dated 17.9.2018. Thus, UPPCL contended that it cannot be held liable for the LPS for a delay caused by the Petitioner's failure to submit the requisite documents in a timely manner.

b. Relying on the Commission's order dated 27.4.2023 in *MB Power (Madhya Pradesh) Ltd. v. UPPCL & Ors.* in Petition No. 202/MP/2021, UPPCL stated that it is entitled to verify the supplementary invoices, and LPS cannot be claimed where the delays are attributable to the generator (the Petitioner in the present case). UPPCL also distinguished judgments cited by the Petitioner, such as in *Adhunik Power* and *GMR Warora*, on the grounds that those cases involved executed PPAs containing restitutionary clauses, which are absent in the present matter.

c. There is no contractual clause between the Petitioner and TPTCL authorizing recovery of LPS, and the Petitioner has failed to demonstrate that it is entitled to LPS under any legally binding arrangement.

14. The Petitioner, in its compliance affidavit dated 18.9.2023 has provided the details of the invoices issued by it towards the increase in the rate of CEC for the months of May, June, August, and September 2016 along with debit note dated 1.11.2018 issued by Petitioner along with all the supporting documentations relating to the CEC. The Petitioner has mainly submitted as under:

(a) In line with Clause 18.11(g) of the RfP, the Petitioner is entitled to the LPS for any delay in payment beyond 30 days from the issuance of the invoice. In the present case, the principal amount was released by UPPCL only on 24.05.2021, after a delay of approximately 58 months from the date of the issuance of the invoice. Notably, the claim for LPS was not waived by the Petitioner at any point; rather, the same was consistently pursued. Further, all the relevant supporting correspondence has already been placed on record as part of the main Petition.

(b) On the issue of waiver, during a virtual meeting held on 27.10.2020 (amid COVID-19 restrictions), it was agreed internally that any decision on waiver of LPS would be considered only after UPPCL released the full principal amount. This position was conveyed by the Petitioner through an email dated 4.11.2020 to TPTCL. TPTCL forwarded the same to UPPCL vide its letter dated 5.11.2020. The Petitioner reiterated the abovementioned stance in its subsequent letters dated 17.12.2020 and 6.2.2021, reaffirming that the waiver of the LPS would not be considered unless and until the principal was fully paid.

Hearing dated 28.1.2025

15. The Petition was heard on 28.1.2025, and the order was reserved in the matter. Based on the request of the learned counsels for the parties, the Petitioner and the Respondents were permitted to file their respective written submissions. Accordingly, the parties have filed their respective written submissions, which are not repeated here for the sake of brevity and reiteration.

Analysis and Decision

16. After going through the pleadings on record and the submissions advanced by the learned counsels for the parties, we note that the following issues arise for our consideration:

Issue No. 1: Whether the claim raised by the Petitioner in the present Petition is barred by the principles of constructive res judicata as well as Order II Rule 2 of the Code of Civil Procedure, 1908?

Issue No. 2: Whether the Petitioner is entitled to LPS on account of the delay in the payment made by UPPCL, in terms of Clause 18.11(g) of the RfP?

Issue No. 3: Whether the Petitioner is entitled to interest on the outstanding LPS amounts till the actual date of payment?

The aforesaid issues have been dealt with in the succeeding paragraphs.

17. However, before proceeding further, it is pertinent to highlight a letter dated 8.4.2025 circulated by the learned counsel for UPPCL during the course of the hearing. In the said letter, it has been brought to our notice that in another similar Petition bearing Petition No. 253/MP/2024, order has been reserved on maintainability in view of the Hon'ble Supreme Court's judgment dated 23.9.2024 in '*Damodar Valley Corporation v. Madhya Pradesh Power Management Company Limited & Anr.*'. Accordingly, UPPCL has requested appropriate directions, including for re-hearing, as the Commission may deem fit and proper in the facts and circumstances of the subject Petition. In this regard, it may be noted that the Commission in its order dated 12.6.2025 in Petition No. 253/MP/2024 (*Jindal India Power Limited v. BEST & Anr.*) has noted as under:

"25. The above provision highlights that once the Commission decides that the matter is to be adjudicated through arbitration, then it is for the Commission to nominate the arbitrator(s) on an application filed by either party. As stated above, there is no valid arbitration agreement between the parties, and the parties have also not filed any application seeking reference of the disputes to arbitration. There is also no consensual acceptance of the parties to the dispute to refer the said matter to arbitration. In fact, the Commission in its order dated 5.11.2018 has held that the disputes relating to the change in law compensation in terms of the LOI dated 14.1.2016 is to be adjudicated by the Commission in terms of Section 79(1)(b) read with section 79(1)(f) of the Act. In the present case, JIPL/TPTCL has sought the payment of LPS, on account of the delay on the part of BEST to make the differential payments of the CIL claims (increase in CEC), in terms of the CIL order 5.11.2018/ 3.12.2018 and the interim order of APTEL dated 17.4.2023. In other words, the liability to pay LPS to JIPL/TPTCL crystallised from the period when BEST made payments towards the change in law compensation, in terms of the debit notes raised by JIPL/TPTCL. According to us, the prayer of JIPL seeking the payment of LPS in the present petition is nothing but a consequential relief, upon BEST making the change in law compensation payments to JIPL, in terms of the orders of the Commission and APTEL. In the light of the above, the dispute is not referable to 'arbitration' and the same is to be adjudicated by the Commission under section 79(1)(f) read with section 79(1)(b) of the Act. Consequent upon this, we hold that the petition filed by JIPL seeking the reliefs, as stated in para 1 above, is maintainable."

18. Although the RfP dated 22.12.2015 in the present case contains an arbitration clause, the prayer(s) of the Petitioner seeking the payment of LPS in this Petition is nothing but a consequential relief, upon UPPCL making the Change in Law compensation payment to the Petitioner in terms of the order dated 17.9.2018 passed by this Commission in Petition No. 158/MP/2017. Hence, in line with the findings of the Commission in the above case, the dispute involved is not referable to 'arbitration' and the same is to be adjudicated by the Commission under Section 79 of the Act. In light of the above, we now proceed to deal with the issues outlined earlier.

Issue No. 1: Whether the claim raised by the Petitioner in the present Petition is barred by the principles of constructive res judicata as well as Order II Rule 2 of the Code of Civil Procedure, 1908?

19. On the issue of maintainability of the Petition, the Respondent UPPCL has submitted that the Petitioner's claim for LPS is barred under Order II Rule 2 of the Code of Civil Procedure, 1908, as it arises from the same cause of action that was already adjudicated by the Commission in Petition No. 158/MP/2017. UPPCL has emphasized that in the earlier proceedings, the Petitioner sought a declaration of a Change in Law event and reimbursement of the differential CEC but did not seek LPS. The Commission's final order in the aforementioned matter, dated 17.09.2018, did not provide for LPS either. UPPCL has further stated that the Petitioner had a full opportunity to claim LPS in the first round, but it failed to do so. The claim, being part of the same transaction (i.e., reimbursement of increased CEC due to Change in Law), cannot now be agitated separately without the leave of the Commission, which was never sought. UPPCL has specifically cited Order II Rule 2 and has argued that the Petitioner's failure to claim LPS earlier in Petition No. 158/MP/2017 precludes it from doing so now.

20. *Per contra*, the Petitioner has submitted that the principal amount towards the CIL claims was paid by UPPCL on 24.5.2021. Relying on the order dated 9.8.2023 in Petition No. 173/MP/2022, the Petitioner has submitted that its entitlement to LPS arose only upon such delayed payment, and therefore, the LPS component could not have been claimed in the original CIL Petition, as the claim had not crystallized at that stage.

21. We have considered the submissions of both parties. We note that the gravamen of the Petitioner emanates from the delay in honouring the invoices by the Respondent UPPCL in light of the order passed in Petition No. 158/MP/2017. According to the Respondent, UPPCL carrying cost, and the LPS claimed by the Petitioner in the present Petition are not maintainable in view of provisions of Order II Rule 2 of the CPC and also in light of constructive *res-judicata* under Section 11 of the CPC. The Respondent UPPCL has submitted that since the Petitioner omitted to claim LPS in the main Petition, the Petitioner cannot be allowed to file a subsequent Petition to claim the relief so omitted. On the other hand, the Petitioner has submitted that the issue raised is squarely covered by the Commission's decision dated 9.8.2023 in Petition No. 173/MP/2022, wherein a similar objection was raised and rejected by the Commission. It has also been submitted by the Petitioner that since the entitlement of LPS arose upon delay in payment made by Respondent UPPCL, the same claim could not have been raised in the original Change in Law Petition No. 158/MP/2017.

22. In this regard, it is pertinent to refer to the provisions of Section 11 as well as Order II Rule 2 of the Code of Civil Procedure, 1908.

23. Section 11 of the Code of Civil Procedure, 1908, stipulates as under:

“11. Res judicata— No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.—An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

24. Order II Rule 2 of the Code of Civil Procedure, 1908 stipulates as under:

“ORDER II- FRAME OF SUIT

... 2. Suit to include the whole claim—

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

25. A plain reading of the aforementioned provisions of the Code of Civil Procedure reveals that, under Section 11, any suit or issue, in which the matter directly and substantially in issue, has been heard and finally decided on merits by the competent Court cannot be tried again by any Court if the matter directly and substantially in issue is the same between the same parties to the suit. The rule of constructive *res judicata* is provided under Explanation IV of Section 11 of the Civil Procedure Code, 1908. It is observed that, while *res judicata* fundamentally prohibits a suit that has already been decided by a competent court, constructive *res judicata* prohibits raising issues that should have been raised in the previous suit. It provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject-matter.

26. The object of Order II Rule 2 of the Code of Civil Procedure, 1908, is to ensure that no defendant is sued or vexed twice with regard to the same cause of action, and second, to prevent a plaintiff from splitting claims and remedies based on the same cause of action. The effect of Order II Rule 2 of CPC is to bar a plaintiff, who had earlier claimed certain remedies with regard to a cause of action, from filing a second suit with regard to other reliefs based on the same cause of action. The Commission

observes that Section 11 of the Code of Civil Procedure, read with Order II Rule 2 of the Code of Civil Procedure, bars the subsequent suit on the same cause of action, but does not, however, bar a subsequent suit based on a different and distinct cause of action.

27. In the present case, the claim of the Petitioner for the LPS on the Change in Law compensation is premised on an entirely different and distinct cause of action than its claim for the Change in Law compensation. The former is premised on the Respondent UPPCL having failed to honour the invoices raised towards the Change in Law compensation and cannot said to be a ground of attack/claim that is essentially connected with or incidental to the Change in Law determination as involved in earlier Petition No. 158/MP/2017 filed by the Petitioner. Also, the Commission in its order dated 9.8.2023 in Petition No. 173/MP/2022 has observed that the “right to sue” in relation to LPS claims can begin to run only when there is a default in making the payment of LPS, which can only be subsequent to the crystallization of the LPS liability, i.e. date on which the payment towards the invoices has been made. In view of the same, in the present case, the Petitioner could not have claimed the same in the original Petition No. 158/MP/2017, as the Petitioner’s right to claim LPS crystallized only upon the payment of the principal amount by Respondent UPPCL, i.e., on 24.5.2021. Therefore, the contention of the Respondent that the present Petition is barred by constructive *res judicata* and Order II Rule 2 is not tenable.

28. In view of the foregoing, we observe that the claims of the Petitioner towards the LPS are not barred by the principles of constructive *res judicata* as well as Order II Rule 2 of the Code of Civil Procedure, 1908, and thus are maintainable.

29. This issue is answered accordingly.

Issue No. 2: Whether the Petitioner is entitled to LPS on account of the delay in the payment made by UPPCL, in terms of Clause 18.11(g) of the RfP?

30. The next issue is concerned with the entitlement of LPS on account of the delay in payment by UPPCL. Admittedly, the Petitioner has filed the present Petition seeking a direction to UPPCL for payment of LPS amounting to ₹5,90,52,713/- (as on 16.4.2022) in respect of the delay in payment of the differential amount towards increased CEC in terms of the Order dated 17.9.2018 in Petition No. 158/MP/2017. The Petitioner has submitted that although the principal amount of ₹5.12 crores was paid by UPPCL on 24.05.2021, the payment was made after an inordinate delay of approximately 32 months from the date of the Commission's order and about 58 months from the date of the invoice. The Petitioner contends that it is entitled to LPS in terms of Clause 18.11(g) of the RfP. Whereas, the Respondent UPPCL, while denying such claims, has submitted that there were no directions for payment or reimbursement of Change in Law claims within a particular fixed timeline or direction for outright payment. Further, there is no contractual agreement between the parties stipulating the Petitioner's entitlement to LPS.

31. We have considered the submissions of both sides. Firstly, it is pertinent to refer to the LPS provision as envisaged under the RfP. Clause 18.11(g) of RfP reads as follows:

"Clause 18.11

(...)

c) CHANGE IN LAW- Change in Law shall mean to include

(...)

• Any change in taxes (excluding income tax), duties, cess or introduction of any tax, duty, cess made applicable for supply of power by the Seller

(...)

g) *Billing and Payment:*

(...)

“Surcharge for late payment:

A delay payment surcharge of 1.25% (one and quarter percent) per month for the number of days delay shall be leviable on all dues remaining unpaid for more than 30 days from the date of submission of the bill. If the due date of the payment is UPPCL/Bank holiday, the immediate next working day will be treated as due date of payment.”

[Emphasis Supplied]

32. Next, it is further noted that there exists a legally binding contractual relationship between UPPCL and the Petitioner, despite TPCTL acting as an intermediary trading licensee. This was also observed by the Commission in its previous order dated 17.9.2018 in Petition No. 158/MP/20217. Relevant excerpts of the order are as follows:

“17. In this case, no PPA had been executed between JITPL (the generating company) and TPTCL (the inter-State trader). Also, no PSA had been executed by UPPCL (the distribution licensee) with TPTCL. UPPCL had only issued the above LOIs for supply of power by TPTCL from the source, JITPL. In this background, the question which begs for consideration is whether the LOI can be considered as a legally binding contract.

...

21. Thus, the LOIs issued by UPPCL reveal that they are in the nature of acceptance of offer for supply of power in favour of UPPCL for a valid consideration. Thus, the LOIs dated 18.1.2016, 28.1.2016 and 30.1.2016 issued by UPPCL constitute an award of contract by UPPCL to TPTCL for supply of power.

22. It is however observed that Clause 18.23 of the RfP provides for execution of a contract agreement with UPPCL within 15 days from acceptance of LOIs failing which LOIs shall be terminated and EMD forfeited. However, neither any such agreement was executed by UPPCL with TPTCL nor the LOIs terminated by UPPCL and EMD forfeited. The Petitioner No.1, TPTCL after accepting the LOIs, had acted upon the same and has supplied power to the respondent UPPCL. Also, UPPCL had made payments for the quantum of power supplied by TPTCL. Thus, by conduct of the parties, a final concluded contract came into existence from that date onwards. In view of this, we hold that the LOIs constitute legally binding contracts between TPTCL and UPPCL.

23. In terms of the RFP, the successful bidder was to disclose the source of supply of power and to provide a confirmation from the source of generation. The Petitioner No.2, JITPL had authorised TPTCL to supply power from its plant

to UPPCL based on which TPTCL had indicated the plant of JITPL as the source of supply. Further, the LOIs issued by UPPCL also recognised JITPL as the generation source for supply of power by TPTCL. Moreover, it is undisputed that TPTCL had also supplied power to UPPCL from the generating station of JITPL in terms of the LOIs. The LOIs read with the provisions of RFP unambiguously established the nexus between the generating company JITPL and the distribution licensee, UPPCL even though power is supplied through TPTCL, which is an inter-state trading licensee. Hence, the contention of the Respondent UPPCL that it has no privity of contract or arrangement with JITPL lacks merit. We therefore hold that the present Petition filed by JITPL for adjudication of disputes against UPPCL is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.”

33. As the Commission has already decided specifically in Para 22 of the order dated 17.9.2018 in Petition No. 158/MP/2017 that there was a legally binding contractual relationship between UPPCL and JITPL in the form of LOIs, the question with respect to the absence of contractual agreement between the parties does not arise. Therefore, by reading the aforementioned para(s) holistically, we are not inclined to agree with the contentions of the Respondent UPPCL that the Petitioner has suppressed material facts with respect to its contractual relationships.

34. Next, the Respondent UPPCL has contended that it has not delayed the payment of the Change in Law claims. As per the Commission's directions in the Order dated 17.9.2018, the Petitioner and TPTCL were required to furnish the invoices along with proof of payment and an Auditor Certificate to enable reconciliation of claims. The same was completely provided by the Petitioner to UPPCL only on 8.4.2021, and thereafter, upon receiving the complete documentation, payment was released by UPPCL on 24.5.2021. Therefore, there was no delay on the part of UPPCL in complying with its obligations as per the Order dated 17.9.2018. Further, UPPCL cannot be held liable for LPS for a delay caused by the Petitioner's failure to submit the requisite documents.

35. On the contrary, the Petitioner has submitted that, in compliance with the directions contained in the Order dated 17.9.2018, it had, by its letter dated 1.11.2018, provided all requisite documents to TPTCL, which in turn was forwarded the same to UPPCL. However, UPPCL sought clarifications on the said documents only in April 2021, after a delay of approximately 872 days.

36. After the Commission's order dated 17.9.2018, TPTCL raised its claim on 25.9.2018, which was responded to by UPPCL *vide* its letter dated 4.10.2018, requesting TPTCL to furnish the proof of payment and computations duly certified by an auditor, including actual generation details during the LOI period, along with its bill. With reference to the UPPCL letter dated 4.10.2018, TPTCL *vide* its letter dated 2.11.2018 provided proof of payment, computations duly certified by auditors, and actual generation details. After that, TPTCL consistently followed up with UPPCL, *vide* its letters dated 28.1.2019, 13.2.2019, 12.4.2019, and 19.2.2020, but UPPCL did not respond. A joint meeting of UPPCL, JITPL, and TPTCL was held on 27.10.2020 for the payment of CEC and waiver of LPS, and after that, TPTCL *vide* its letter dated 5.11.2020 clarified that the full principal be paid immediately, and the interest/surcharge matter will be again taken up with TPTCL/ JITPL management. On 23.3.2021, UPPCL wrote to TPTCL that the payment details provided in support of the CEC payment were unclear, which were furnished by TPTCL to UPPCL on 8.4.2021. After verification of the CEC reimbursement claims by UPPCL, reimbursement was made by UPPCL on 24.5.2021.

37. From the chronology of facts and circumstances of the present case, it is pertinent to note that the Petitioner had raised relevant invoices to UPPCL along with its documentary proofs, as required, for the CEC differential and continued to pursue

payment through proper channels. Hence, UPPCL's contentions regarding delay due to documentation are unpersuasive, especially given TPTCL's consistent follow-up and repeated submission of supporting documents. Furthermore, the fact that UPPCL has, on multiple occasions, requested the Petitioner to waive its claim for LPS clearly indicates that, even as per UPPCL's own understanding, LPS is payable to the Petitioner on account of the delay in making payment of the principal amount towards the Change in Law claims.

38. It is also noted that the payment of the principal amount on 24.5.2021, after prolonged delay, without accompanying LPS, is contrary to the spirit of Clause 18.11(g) of the RfP. Needless to add, the same has already been held as a Change in Law in Petition No. 158/MP/2017. Coming to the LPS, we note that the objective of LPS is to secure timely payment, and LPS becomes applicable in the event of a delay in actual payment. This was also observed by the Hon'ble Supreme Court in the case of *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, (2022) 4 SCC 657. Relevant excerpts of the above judgment are as follows:

"176. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer i.e. the appellant. In other words, LPS dissuades the procurer from delaying payment of charges. (...)

177. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The appellant has a contractual obligation to make timely payment of the invoices raised by the power generating companies, subject, of course, to scrutiny and verification of the same. Mr Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the appellant, the appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the power generating companies, and avoided LPS."

[Emphasis Supplied]

39. In fact, the aforesaid principle was further reaffirmed by the Hon'ble Supreme Court in the case of *Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited and Ors.*, [(2023) 7 SCC 401], whereby the Hon'ble Court upheld the liability of the distribution licensees to pay LPS in the event of delay in honouring invoices raised by the generators. Relevant paras are extracted as under:

“153. CERC, apart from its finding on SHR and GCV, has also directed late payment surcharge to be paid. The same has been affirmed by the learned Aptel. CERC as well as the learned Aptel, on the interpretation of Articles 8.3.5 and 8.8.3 of the PPA, have concurrently found that the procurer had delayed the payment by not making the payment within the due date and, as such, GMR was entitled to late payment surcharge. We find no reason to interfere with the said concurrent findings of fact.”

[Emphasis Supplied]

40. Thus, in light of the above, we note that the Petitioner is entitled to LPS in terms of Clause 18.11 (g) on account of the delay in honouring the invoice by Respondent UPPCL. Having noted that the LPS is bound to be paid by the Petitioner, we proceed to deal with the contention of the Respondent that LPS was never pleaded in the Change in Law Petition, i.e., Petition No. 158/MP/2017. In this regard, it is pertinent to refer to the judgment of the Hon'ble Supreme Court in the case of *Bangalore Electricity Supply Co. Ltd. v. Hirehalli Solar Power Project LLP*, [(2025) 1 SCC 435] in which the Hon'ble Court upheld the APTEL's judgment in granting LPS, despite not been pleaded before the Karnataka Electricity Regulatory Commission, on the basis that the LPS is explicitly rooted in the provisions of the contract therein. Relevant paras of the judgment are as under:

“14. Lastly, we also reject the appellant's contention that the APTEL's direction to pay late payment surcharge to the respondents is unjustified since the same was not pleaded. As we have already held, the APTEL rightly restored the tariff of Rs. 8.4 per unit and directed the appellant to pay the difference amount. The direction to pay the late payment surcharge on this amount is explicitly rooted

in the PPA, and hence, is in furtherance of the intention of the parties. There is no reason to set aside the same.”

41. Hence, as per the submissions made by the Petitioner and the ratio laid down by the Hon'ble Supreme Court in the case of *Bangalore Electricity Supply Co. Ltd. v. Hirehalli Solar Power Project LLP*, the failure of UPPCL to make the timely payment towards the Change in Law compensation to the Petitioner amounts to a breach of its contract and as well as the direction of the Commission in its Order dated 17.9.2018.

42. We also note that as per Clause 18.11 (g), the delay in payment of surcharge of 1.25% per month for the delayed number of days shall be levied on all due remaining unpaid for more than 30 days from the date of submission of the bill. However, the Respondent UPPCL has contended that Clause 18.11(g) of RFP lays down the billing & payment mechanism for daily bills & daily payments, *i.e.*, bills for energy supply only. On such daily bills, a delay payment surcharge at 1.25% (which works out to 15% per annum) is applicable. The expression “all dues” cannot be stretched out of proportion beyond the nature of dues contemplated under Clause 18.11(g) of the RfP to take within its fold dues towards Change in Law claims raised by the Petitioner JITL pursuant to the declaration of such Change in Law by the Commission.

43. On the contrary, the Petitioner, relying on Clause 18.11 (g) of the RfP, has submitted that it is entitled to the LPS for ‘all dues’ (which necessarily includes the CIL claim) remaining unpaid for more than 30 days from the date of submission of the bill.

44. From the submissions of the parties and considering that the material available on record, we observe that the term “all the dues” in Clause 18.11(g) of the RfP does not merely refer to the outstanding amount for the supply of power but also encompasses any and all amounts payable under the RfP. Further, the Petitioner's

right to claim LPS towards the delay in payment of the Change in Law compensation arose only on 24.5.2021, *i.e.*, upon receipt of the said compensation from UPPCL, when the Petitioner's claim for LPS stood crystallized. Further, it is also observed that in the Order dated 17.9.2018, the Commission has already held that the Petitioner is entitled to compensation under Change in Law on account of the increase in CEC, in terms of Clause 18.11(c) of the RfP, there is no justification for excluding such dues from the ambit of "all the dues."

45. In view of the above, we observe that the Petitioner is entitled to LPS on account of delay by UPPCL in releasing the payment *qua* differential amount on account of increase in CEC in terms of Clause 18.11(g) of the RfP from the date of invoice(s), *i.e.*, 4.6.2016, 4.7.2016, 12.9.2016, and 4.10.2016 till 24.5.2021.

46. It is also to be noted that there is no specific provision in the RfP for the computation of the LPS on a compounding basis. LPS shall be allowed up to the date of actual payment of the principal without compounding on a monthly basis as claimed by the Petitioner.

47. The Petitioner and UPPCL are directed to reconcile the aforementioned amount within 30 days of this Order and thereafter make the payment of the aforesaid outstanding LPS amount within a month thereafter.

48. This issue is answered accordingly.

Issue No. 3: Whether the Petitioner is entitled to interest on the outstanding LPS amounts till the actual date of payment?

49. Given that we have allowed the claim of the Petitioner's claim of LPS on the Change in Law compensation in terms of Clause 18.11(g) of the RfP from the date of

invoice(s) only till the date of actual payment of principal, we now proceed to examine the present issue as to whether the Petitioner is entitled to interest on the outstanding LPS amount till the actual date of payment.

50. In this regard, it would be prudent to refer to the findings of the order dated 9.8.2023 in Petition No. 173/MP/2022 wherein the Commission has held as under:

“46. We have considered the submissions made by the parties. Admittedly, the LPS claims of the Petitioner pertaining to the period from 21.1.2019 till 10.1.2020 under POs 1 & 2 are yet to be paid by the Respondents, and in the foregoing paragraphs, we have issued directions to the Respondents to make the payments within a month from the date of this order. Accordingly, the question arises as to whether there can be any direction for awarding interest on the LPS till the date of its actual payment. We notice that a similar issue had come up for consideration before the APTEL in Appeal No. 386 of 2019, titled Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Anr. The said appeal was filed by the appellant, Maharashtra State Electricity Distribution Company Limited (MSEDCL), on being aggrieved by the direction of MERC to pay the penal interest on the outstanding Delayed Payment Surcharge to the wind power generator. The said direction was contested by MSEDCL on various grounds, including that it amounts to interest on interest (double penalty), that the penal levy is against the provisions of the agreement, etc. However, by rejecting such ground, the APTEL, vide judgment dated 20.9.2021, upheld the direction of MERC to levy interest on the Delayed Payment Surcharge. The aforesaid judgment of APTEL was challenged before the Hon'ble Supreme Court by Civil Appeal No.6440 of 2021, wherein the Hon'ble Supreme Court, while vacating the directions given by APTEL (by Para 45) for the financial affairs of MSEDCL to be examined and for appropriate measures to be taken in such regard by the State Commission, disposed of the appeal, declining to interfere with the abovementioned decision on its merits, by order dated 2.3.2022.

47. In view of the aforesaid judgment of the APTEL, which has been upheld by the Hon'ble Supreme Court, the contention of AP Discoms that there cannot be any interest on the outstanding LPS cannot survive. Moreover, as observed by the APTEL in the said judgment, if such contention of AP Discoms is accepted, it would lead to a patently unfair and absurd situation wherein defaulting parties, i.e. AP Discoms in the present case, could simply avoid meeting their undisputed payment commitment towards LPS for the delayed payment of energy charges under the POs and thereafter, not paying the interest thereon despite such dues having remained outstanding for a considerable period (as noted, LPS liability pertains to the period from 21.1.2019 to 10.1.2020), which ultimately compelled the Petitioner to initiate the present legal proceedings for recovery of its legitimate dues. Accordingly, in the facts and circumstances of the present case and balancing the interests of the consumers and the

generators, we find it proper to award the interest on the outstanding LPS dues under POs 1 & 2 at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Thus, the Respondents shall also be liable for interest (at the rate specified above) on the outstanding LPS from the 30th day from the date of the respective LPS invoices till the date of the Order. The Petitioner and the Respondents shall reconcile the amount of interest on LPS within 15 days of this Order and thereafter make the payment of the interest within 30 days.

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

51. Accordingly, the Commission has already held that if the interest on delayed payment is not levied, the same would lead to a patently unfair and absurd situation wherein defaulting parties could simply avoid meeting their undisputed payment commitment towards the LPS for the delayed payment in the differential amount on account of increase in CEC and thereafter, not paying the interest thereon despite such dues having remained outstanding for a considerable period.

52. Thus, in light of the above, we deem it appropriate to award the interest on the outstanding LPS due to the Petitioner at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate as per the LoI/RfP, whichever is lower. The Petitioner and UPPCL shall reconcile the amount of interest on LPS within 15 days of this Order and thereafter make the payment of the interest within 45 days.

53. In view of the foregoing, the Commission directs as follows:

- (a) UPPCL shall pay the LPS to JITPL at the rate of 1.25% per month, calculated on a simple interest basis, for the period commencing from the 31st

day after the submission of invoices for the CEC differential amount till 24.5.2021.

(b) In addition, UPPCL shall pay interest on the outstanding LPS due to the Petitioner at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate as per the Lol/RfP, whichever is lower, till the date of actual payment of the LPS amount by UPPCL.

(c) The Petitioner and UPPCL shall carry out joint reconciliation of the LPS amount on the above basis within 15 days from the date of this Order.

(d) Upon completion of reconciliation, UPPCL shall ensure full payment of the reconciled LPS and the interest amount within 45 days from the date of this Order.

54. In view of the above discussions and findings, Petition No. 122/MP/2022 is disposed of.

Sd/-
(Harish Dudani)
Member

Sd/-
(Ramesh Babu V)
Member

Sd/-
(Jishnu Barua)
Chairperson