

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 253/MP/2024

Coram:

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

Date of Order: 12th June, 2025

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with Clause 7 of the Letter of Intent dated 14.1.2016 issued by Brihan Mumbai Electric Supply and Transport Undertaking (BEST) to Tata Power Trading Company Ltd seeking directions of payment of late payment surcharge on account of delay by BEST in honoring the invoice(s) raised by Petitioner towards claiming additional expenditure incurred by it on account of increase in Clean Energy Cess (CEC) and interest thereupon.

And

In the matter of

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

..... **Petitioner**

Vs

1. The Brihan Mumbai Electric Supply and Transport Undertaking
1st Floor, Multistoried Annex Building, BEST Marg, Colaba,
Mumbai-400001

2. Tata Power Trading Company Limited,
Corporate Centre, 34 Sant Tukaram Road,
Cranac Bunder, Mumbai- 400009

.....**Respondents**

Parties Present:

Shri Aniket Prasoon, Advocate, JITPL
Shri Aman Sheikh, Advocate, JITPL
Shri Sarthak Sareen, Advocate, JITPL
Ms. Nikita Choukse, Advocate, BEST
Ms. Himani Yadav, Advocate, BEST
Shri Tushar Mathur, Advocate, BEST



ORDER

The Petitioner, Jindal India Thermal Power Limited (in short, 'JITPL') has filed the present Petition seeking the following reliefs:

(i) *"Direct the Respondent No.1 i.e., Brihan Mumbai Electric Supply and Transport Undertaking (BEST) to make of Late Payment Surcharge (LPS) of Rs. 3,79,96,613/- (calculated up to 14.06.2024) on account of delay in honoring the invoice(s) raised by Petitioner i.e., Jindal India Thermal Power Limited (JITPL) towards claiming additional expenditure incurred by it on account of increase in Clean Environmental Cess, and further interest up to the date of realization of the LPS; and/or*

(ii) *Pass any orders this Hon'ble Commission may deem just and equitable in favour of the Petitioner."*

2. Tata Power Trading Company Limited (in short, 'TPTCL') is a company incorporated under the Companies Act and is an inter-State trading licensee within the provisions of the Electricity Act, 2003 (in short, 'the Act'). JITPL is a generating company and has authorized TPTCL for the supply of power to the Respondent, Brihan Mumbai Electric Supply & Transport Undertaking (in short, 'BEST') through a back-to-back power sale arrangement. BEST is the distribution licensee in the State of Maharashtra and is procuring power from TPTCL by issuance of a Letter of Intent (LOI) dated 14.1.2016. Thus, TPTCL has been supplying power to the Respondent from the generating station of JITPL as disclosed in the said LOI.

Brief Background Facts

3. BEST initiated a competitive bidding process by issuance of Expression of Interest (EOI) for External Power Purchase for selection of a successful bidder to supply power on a short-term basis for the period from February 2016 to December 2016. TPTCL participated in the aforesaid competitive bid and was selected as the successful bidder to supply the power from JITPL's Project. Accordingly, a Letter of Intent dated 14.1.2016 was issued by the BEST to TPTCL for the supply of power as detailed below:



Months	Time period	Quantum (MW)	Rate	Remarks
March 2016	00 to 24 hrs	50	2.95	On RTC basis
April 2016	00 to 24 hrs	50	3.03	
July 2016	00 to 24 hrs	30	3.07	
December 2016	00 to 24 hrs	50	3.11	

4. Clause 8 of the EOI provides that any delay in payment beyond the due date on all outstanding amounts will attract a 1.25% surcharge per month calculated on a day-to-day basis for each day of the delay after the due date. Clause 10 of the EOI provides that the supplier should specify the source of power supply. Clause 17(E) of the LOI provides that no party (i.e., BEST, TPTCL, and JITPL) will be in breach of its obligation on the occurrence of Force Majeure events, which includes a Change in Law event. Clause 7 of the LOI provides that for the delay in making payment beyond the due date, a Late Payment Surcharge (LPS) of 1.25% per month will be levied on the defaulting party, i.e., BEST in the present case. Thereafter, TPTCL vide its letter dated 21.1.2015, intimated JITPL that it has received the LOI from BEST. Thereafter, the Ministry of Finance, vide its Notification dated 29.2.2016, renamed the erstwhile Clean Energy Cess to Clean Environment Cess (in short, the 'CEC') and also increased the levy of CEC from Rs. 200/tonne to Rs. 400/tonne to all dispatches/lifting of coal w.e.f. 00:00 hrs of 1.3.2016. The same was intimated by the Office of General Manager (S&M), Mahanadi Coal Fields ("MCL") to all the Area General Managers, including Area General Manager, Kaniha, on 29.2.2016. The aforesaid revision was further intimated by the Area Sales Manager, Kaniha, to JITPL on 1.3.2016.

5. Thereafter, JITPL vide its letter dated 10.3.2016, requested TPTCL to accept the increase in tariff by 0.151/- per unit of power due to the increase in CEC as provided therein. TPTCL vide its letter dated 11.3.2016, intimated BEST regarding the aforesaid change in law event and requested to confirm the acceptance of the increase in tariff by



0.151/- per unit. JITPL raised an invoice on 9.4.2016 on TPTCL towards the aforesaid cost for Rs 4977013/- and Rs 1339002/- for the period 1.3.2016 till 31.3.2016 and 1.4.2016 to 8.4.2016 respectively. In response, BEST vide e-mail dated 18.4.2016 to TPTCL, while rejecting the claim of JITPL/TPTCL, intimated that there is no provision in the LOI qua payment of compensatory tariff on account of the change in law events.

6. On being aggrieved by the denial of multiple requests made by TPTCL/JITPL to BEST, TPTCL and JITPL jointly filed Petition No. 159/MP/2017 before this Commission and the Commission vide its order 5.11.2018 ('CIL order'), held that the increase in the rate of CEC from Rs 200/tonne to Rs. 400/tonne is a 'Change in Law' event under Clause 17(E) of the LOI dated 14.1.2016 issued by BEST to TPTCL and that JITPL/TPTCL is entitled to recover from BEST the differential amount towards the CEC for the period from 1.3.2016 till 30.6.2017 within 60 days from the date of the order. Pursuant to the order, TPTCL, vide letter dated 9.11.2018, requested BEST to release the payment towards the increase in the CEC as raised vide debit notes dated 4.7.2016 and 8.1.2017 (Rs 13497683/- and Rs. 4690253/- respectively) totaling Rs. 18187936.40.

7. Pursuant to the above order, JITPL, vide its letter dated 5.12.2018 to TPTCL, informed that the differential amount recoverable from BEST towards the CEC came out to be Rs. 2,01,31,983/- as per actual coal consumption and Rs.1,99,02,018/- as per operational parameters. Accordingly, JITPL requested TPTCL to recover payment of Rs. 1,99,02,018/- along with the applicable LPS from the BEST, and the same was intimated by TPTCL to BEST vide letter dated 6.12.2018 and requested to pay Rs. 1,99,02,018/-, along with the applicable surcharge on account of the increase in CEC.

8. On 18.12.2018, BEST filed an appeal (Appeal No.3/2019) before the APTEL against the CIL orders and also filed an IA seeking a stay of the implementation of the CIL orders.



However, no stay was granted by APTEL. Despite the clear and precise directions given to BEST in the CIL orders by the Commission to make payment of the differential amount towards the increase in CEC, within 60 days from the date of the order, BEST wilfully and deliberately failed to honour the debit note raised by JITPL and TPTCL. Aggrieved thereby, JITPL filed the Execution Petition (Petition No. 139/MP/2022), seeking execution of the CIL orders and initiation of proceedings under Sections 142 and 149 of the Act, seeking directions against BEST for the payment of the change in law claims made by JITPL as per the CIL orders.

9. During the pendency of the execution proceedings, BEST filed IAs in the said appeal and APTEL on 2.9.2022, while refusing to grant interim relief, directed BEST to deposit the amount subject to the outcome of the appeal filed by BEST. Against this interim order, BEST also filed Review Petition (RP No.9/2022) before APTEL, and the same was dismissed by APTEL on 28.10.2022. The said order was challenged before the Hon'ble Supreme Court in Civil Appeal Nos 314-317/2023, and the same was also dismissed by the Hon'ble Court on 1.2.2023. Thereafter, BEST filed IA No. 447/2023 before APTEL seeking directions to deposit the amount of Rs 1.81 crores by way of a Demand Draft, with APTEL or in the alternative with this Commission. However, the said IA was dismissed by APTEL on 17.4.2023, with the observation that its order does not require any clarification and directed BEST to deposit the amount of Rs. 1.81 crore with JITPL. Accordingly, BEST made a payment of Rs 1.81 crore to JITPL on 3.5.2023.

10. Thereafter, the Commission vide its order dated 17.5.2024, disposed of Petition No.139/MP/2022, as under:

19. Accordingly, we are of the opinion that Respondent BEST has not fully adhered to our directives outlined in the Final Orders. Therefore, we direct JITPL to raise a revised invoice, aligning with the Final Orders, for the outstanding payment owed by BEST after



considering the Rs. 1.81 crore already disbursed within 15 days of this order. We further direct the Petitioner and Respondents, TPTCL and BEST, to carry out the reconciliation regarding these claims and settle the payment within 30 days from the date of this order, failing which, the conduct of the Respondent, BEST would be treated as non-compliance of the specific direction of the Commission, and the proceedings under Sections 142 and 149 of the Act shall be initiated against Respondent, BEST. Needless to mention, the above payment is subject to the final outcome of the appeal filed by Respondent BEST before the APTEL

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28. In the present case also, the order under execution dated 5.11.2018 read with the corrigendum dated 3.12.2018, as already noted above, does not contain the grant of any LPS to the Petitioner herein, hence, it would not be appropriate to issue any direction awarding such relief at the stage of the present proceedings.

29. Since the grant of the LPS is clearly not covered under the order dated 5.11.2018 read with the corrigendum dated 3.12.2018, any direction for payment of the LPS, cannot be considered in the present execution proceedings. Needless to say, the matter is pending before the APTEL and the final order of the APTEL will enter into the shoes of the order of this Commission after attaining finality.

11. In terms of the said order, JITPL, vide letter dated 30.5.2024, requested TPTCL to carry out the reconciliation of the remaining outstanding dues and also raised an invoice towards LPS/Interest, on account of the continuing delay on the part of BEST in honouring the invoices raised by JITPL towards the additional expenditure incurred by it towards the CEC. Thereafter, BEST paid the outstanding dues of Rs 1802018/- to TPTCL, and the same was disbursed to JITPL by TPTCL on 11.6.2024. However, in response to JITPL's claim for LPS /Interest for Rs 37996613/- (till 14.6.2024) due to delay by BEST in settling the claims towards CEC, BEST, by e-mail dated 31.5.2024, refused to honour the invoice raised by JITPL/TPTCL. In the above background, JITPL has filed the present petition seeking the aforesaid LPS amount with further interest till the date of realisation, in terms of its prayer under para 1 above.

Submissions of JITPL

12. Petitioner JITPL, in the present Petition, has mainly submitted that the claims of LPS made by JITPL are well within the limitation period as the right to claim LPS commences only subsequent to the payment of the principal amount. Pointing out that BEST paid the



principal amount of Rs 1.81 crore on 3.5.2023 and the remaining balance amount of Rs 1802018/- on 11.6.2024, JITPL has submitted that its right to claim LPS from BEST reckons from 11.6.2024 and is therefore, within the period of limitation. It has been argued that even if the date of payment of Rs 1.81 crore on 3.5.2023 is considered for the calculation of limitation towards LPS, the claim of JITPL is within the period of limitation. JITPL has contended that the failure to discharge liability towards LPS partakes the character of a continuing breach, which gives rise to a fresh cause of action, as long as the breach continues. Pointing out that BEST is in gross violation of the terms of the LOI and the CIL orders, JITPL has submitted that LPS is a contractual right that arises upon the default in the payment of invoices within the due date. Referring to the judgments of the Hon'ble Supreme Court in *MSEDCL v MERC & ors* (2022) 4 SCC 657 and in *GMRWEL v CERC & anr* (2023) 10 SCC 401, JITPL has stated that the payment of LPS in a contract is based on the principle of restitution, as the receiver is entitled to be compensated for such delayed payment and to bring back the claimant to the same economic position as it would have been, if such change in law did not take place. JITPL has added that it is entitled to interest on the outstanding dues till the actual date of payment of LPS by BEST.

Hearing dated 22.11.2024

13. During the hearing on 'admission', notice was issued to the Respondents, subject to just exceptions and with directions to the parties, to complete pleadings in the matter.

14. Pursuant to the change of name from JITPL to Jindal India Power Ltd (JIPL) vide certificate of incorporation dated 19.9.2024, JIPL filed an affidavit dated 21.11.2024 enclosing the amended memo of parties, including a copy of the said certificate. This affidavit is taken on record, and the name of the Petitioner JITPL, in this petition, is



amended as JIPL. Further, in compliance with the directions of the Commission vide ROP of the hearing dated 22.11.2024, BEST has filed its reply affidavit on 31.12.2024, and JIPL has filed its rejoinder affidavit on 16.1.2025 along with a copy of the LPS calculation sheet with interest (till 10.1.2025).

Hearing dated 21.1.2025

15. On a specific query by the Commission as to whether the question of arbitrability of the dispute (whether tariff or non-tariff) has been addressed by the parties, the learned counsel for JIPL, while answering in the negative, sought time to file its submissions on the same. The learned counsel for BEST, while pointing out that the matter pertains to LPS, submitted that it has also raised the issue of limitation with regard to the claim of JIPL and sought time to file its written submissions, including the question of the arbitrability of the disputes. The Commission adjourned the hearing of the Petition after directing JIPL and BEST to file their written submissions, including the question of 'arbitrability' of the disputes.

16. In compliance with the directions above, the Petitioner, JIPL, filed its note of arguments (dated 17.1.2025) including additional submissions vide affidavit dated 27.2.2025, and the Respondent BEST has filed its written submissions on 18.3.2025.

Additional submissions of JIPL

17. With regard to the issue of arbitrability of the matter, JIPL in its additional submissions has stated that the outcome of the present dispute (whether tariff or non-tariff) will inherently entail an impact on tariff and thus, the same ought not to be referred to arbitration. While reiterating its submissions in the rejoinder, JIPL has referred to the judgment of the Hon'ble Supreme Court in *GMRWEL v CERC & anr* (2023) 10 SCC 401



and submitted that the Hon'ble Court has reprimanded the conduct of the discoms of making untimely payment of the change in law compensation, as the same is detrimental to the interest of the consumers. It has been contended that referring the matter to arbitration will only prolong the delay in adjudication, increasing the LPS liability and imposing additional financial burden on consumers. JIPL has stated that, at this stage, when pleadings are already completed before this Commission, arbitration would result in duplication of proceedings, further delays, and additional costs, all of which would ultimately be borne by the end-consumers. Also, JIPL has pointed out to Regulation 59 of the CERC (Conduct of Business) Regulations 2023 ('the COB Regulations'), which provides for the disposal of the petitions within a period of six months, after admission, and submitted that as on 27.2.2025, 257 days had already lapsed from the date of filing of the present Petition and if the present petition is referred to arbitration, the entire adjudication process will have to restart, leading to further delays, which is contrary to the objective of expeditious resolution envisaged under the said regulations. Accordingly, JIPL has submitted that the Commission ought to decide the main petition for the timely disposal of the matter, rather than referring the present matter to arbitration.

Written submissions of BEST

18. BEST in its written submissions, while reiterating that JIPL's claim is barred by limitation and interest on LPS, which amounts to a penalty, is impermissible in law, has submitted that the present dispute is not arbitrable. Pointing out that any adjudicatory body can only refer a dispute for arbitration if a dual test is satisfied, viz (a) Party should agree to the underlying contract and (b) Parties should have agreed to be bound by the arbitration agreement, BEST has argued that while parties agreed to be bound by the LOI for supply of electricity, they never agreed upon 'arbitration' as a dispute resolution



method, which is evident from the fact that there is no clause for reference of disputes to arbitration, either in Clause 19 of the EOI and Clause 16 of the LOI. Accordingly, BEST has submitted that there is no valid arbitration agreement between the parties and the parties do not wish to be bound by arbitration and therefore, the parties cannot be referred to arbitration, in the absence of a valid arbitration agreement and mutual consent (*Reliance placed on the judgment in KSEB v. Kurien E. Kalathil, 2018 (4) SCC 793*). It has also stated that APTEL vide its judgment dated 28.8.2024 in Appeal No.309/2019 (MPPMCL v DVC) (in short, the 'MPPMCL case') held that only such disputes, which pertain to 'non-tariff' issues ought to be referred to arbitration and that in any case, disputes pertaining to 'change in law' events would always constitute 'tariff disputes' and only the Appropriate Commission is empowered to adjudicate upon the same. BEST has also referred to the Hon'ble Supreme Court's judgment in AP Transco v Sai Renewable Power (P) Ltd (2010) SCC OnLine SC 714 and submitted that while the term 'tariff' is not defined in the Act, the Hon'ble Court held that the term 'tariff' is of wide import and includes within its ambit, not only the fixation of rates, but also the rules and regulations relating to it, and is thus to be construed as 'terms and conditions of tariff'. Considering that the present dispute pertains to the recovery of LPS, which clearly falls within 'terms and conditions of tariff' and has arisen on account of an 'change in law' adjudication, BEST has contended that the same can never be considered 'arbitrable' in terms of the MPPMCL judgment and the claim of LPS, as raised, in the present Petition, is essentially in the nature of claiming a supplementary tariff, which brings it under the purview of a 'tariff dispute', thereby conferring a sole jurisdiction on this Commission to adjudicate upon it.



Hearing dated 23.2.2025

19. The Commission, after a virtual hearing of the submissions of the learned counsels for the Petitioner and the Respondent BEST, that the matter is required to be adjudicated by the Commission, reserved its order on 'maintainability'.

20. From the submissions above, it is for consideration as to whether the matter is referable to arbitration in terms of the APTEL judgment in the MPPMCL case or is to be adjudicated by the Commission, in terms of its powers under Section 79(1)(f) of the Act. JIPL has submitted that the matter which entails an 'impact on tariff', is not to be referred to arbitration, on the ground that the same will prolong the delay in adjudication, thereby increasing the LPS liability and imposing additional financial burden on consumers. BEST has pointed out that there is no valid arbitration agreement between the parties, and the parties also do not wish to be bound by arbitration. Arguing that the present dispute pertains to the recovery of LPS, which clearly falls within the 'terms and conditions of tariff' arising on account of a 'change in law' adjudication, BEST has submitted that the same can never be considered 'arbitrable' in terms of the MPPMCL judgment.

Analysis and Decision

Maintainability

21. We have examined the submissions of the parties. Section 79(1)(f) of the Act provides as under:

"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) (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

(c) To regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

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(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;

22. Also, Section 8(1) of the Arbitration and Conciliation Act, 1996 ('A&C Act'), by the amendment of 2015, provides as under:

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

23. Thus, Section 79(1)(f) of the Act empowers the Commission to adjudicate upon disputes involving generating companies and distribution licensees with regards to the matters connected with clauses (a) to (d) of sub-section (1) i.e., matters connected to regulation of the tariff of the generating companies as well as inter-State transmission of electricity and to determine the tariff for inter-state transmission of electricity. It also gives discretion to the Commission to refer any such dispute for arbitration. Further, section 8(1) of the A&C Act mandates a judicial authority to refer parties to arbitration unless there is prima facie finding that no valid arbitration agreement exists. In other words, unless there is an arbitration agreement between the parties, the dispute cannot be referred to arbitration.

24. It is noticed that the Commission vide its order dated 5.11.2018 in Petition No.159 / MP/2017, has upheld the jurisdiction of the Commission to adjudicate the disputes with regard to the change in law compensation, in terms of section 79(1)(b) read with section 79(1)(f) of the Act. No PPA/PSA has been executed by the parties in the present case.

However, it is noticed that the Commission, in the order dated 5.11.2018, while examining the question of the privity of contract, held that the LOI dated 14.1.2016, issued by BEST to TPTCL, for the supply of power from JIPL, constitutes a legally binding contract. Admittedly, the EOI and the LOI dated 14.1.2016 do not contain any arbitration clause. However, it is noticed from the LOI (sl.no.16) that the parties, for resolution of the disputes, have agreed that all differences or disputes between the parties arising out of or in connection with these transactions covered by the agreement shall be settled in accordance with Section 158 of the Electricity Act, 2003, as amended from time to time. Section 158 of the Act provides as under:

“Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the license of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996”

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 JITPL, 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.

26. BEST in the present petition has also raised issues on merit, stating that the claims of JITPL are barred by limitation and are also hit by the principles of constructive res judicata. Having held that the petition is maintainable, as above, we 'admit' the petition and direct the listing of the petition to hear the parties on merits, during the second week of July 2025, for which a separate notice will be issued to the parties. Pleadings shall be completed by the parties, if not done earlier.

Sd/- (Ravinder Singh Dhillon) Member	Sd/- (Harish Dudani) Member	Sd/- (Ramesh Babu V.) Member	Sd/- (Jishnu Barua) Chairperson
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