

**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: 1st November, 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 Shubham Singh, Advocate, JITPL
Shri Sarthak Sareen, Advocate, JITPL
Ms. Nikita Choukse, Advocate, BEST



ORDER

The Petitioner, Jindal India Power Limited (in short, 'JIPL'), 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.

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 requires the supplier to 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 include 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 the General Manager (S&M), Mahanadi Coal Fields ("MCL"), to all Area General Managers, including the Area General Manager at 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 aforementioned change in law event and requested confirmation of acceptance of the tariff increase by 0.151/- per unit. JITPL raised an invoice on 9.4.2016 on TPTCL towards the aforesaid cost for Rs 4977013/- and Rs1339002/- for the period 1.3.2016 till 31.3.2016 and 1.4.2016 to 8.4.2016 respectively. In response, BEST vide email 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 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 the payment of Rs. 1,99,02,018/- along with the applicable LPS from 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 a Review Petition (RP No.9/2022) before APTEL, which 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 of Rs 37996613/- (till 14.6.2024) due to BEST's delay 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 Petitioner, 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 constitutes 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 a delayed payment and to bring back the claimant to the same economic position as it would have been, if such a 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 the pleadings in the matter. In compliance with the ROP for the hearing dated 22.11.2024, the Respondent BEST filed its reply vide affidavit dated 30.12.2024, and JIPL has filed its rejoinder affidavit on 16.1.2025, along with a copy of the LPS calculation with interest (till 10.1.2025). Pursuant to the change of name from JITPL to Jindal India Power Ltd (in short



'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'.

Hearing dated 21.1.2025

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

Hearing dated 23.2.2025

15. The Commission, after hearing the learned counsels for the parties on the question of arbitrability of the disputes, reserved its order on 'maintainability' of the petition, on 23.2.2025. Thereafter, vide order dated 12.6.2025, the Commission, after holding that the dispute is not referable to 'arbitration' and that the same is to be adjudicated by this Commission under section 79(1)(f) read with section 79(1)(b) of the Act., 'admitted' the petition, with directions to hear the parties on 'merit'. The relevant portions of the said order are extracted below:

"25. 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.”

Hearing dated 7.7.2025

16. After hearing the learned counsel for the Petitioner JIPL and the Respondent, BEST, on merits, the Commission reserved its order in the petition. However, the Commission permitted the parties to file their written note of arguments, after serving a copy to the other. In compliance with the said directions, the Petitioner JIPL has filed its submissions vide affidavit dated 20.7.2025 and the Respondent BEST, vide an affidavit dated 24.7.2025.

Written submissions of the Petitioner JIPL

17. JIPL, in its submissions, has reiterated the background facts leading to the petition, and has mainly submitted the following:

Issues involved in the present Petition are squarely covered by this Commission's order dated 1.7.2025 in Petition No. 122/MP/2022

(i) JIPL has filed the present Petition seeking direction against BEST for payment of the claim towards LPS on account of the delay in releasing the payment qua the differential amount on account of the increase in CEC in terms of Clause 8 of the EOI and Clause 7 of the LOI for purchase of power and further interest accrued thereupon till the date of realisation of the payment.

(ii) The issues involved in the Petition have already been adjudicated and settled by this Commission in its order dated 1.7.2025 in Petition No. 122/MP/2022, which was filed by JIPL seeking direction against the Discom for the recovery of the LPS on account of the delay in releasing the payment qua the differential amount on account of the increase in CEC. By order dated 1.7.2025, the Commission had allowed JIPL's claim of LPS from the date of issuance of CIL differential invoices therein, till the date of actual payment of the CIL claim and has further allowed interest till the date of actual realisation of LPS amount. The arguments raised by BEST in this petition are similar to those raised by the Discom in the said petition, and the same have been rejected by this Commission after providing detailed observations and reasoning. The observation of the Commission in the order dated 1.7.2025 is as under:



Re: The Petition is not maintainable in terms of Order II Rule 2 CPC

- (a) In Petition No. 122/MP/2022, the Discom contended that the JIPL's claim for LPS is barred under Order II Rule 2 of CPC, as it arises from the same cause of action that was already adjudicated by this Commission in Petition No.158/MP/2017, wherein JIPL had not sought LPS. Notably, even in the present Petition, BEST has raised similar contentions and the application of the Henderson principle and Doctrine of constructive *res judicata* to the present matter.
- (b) The Commission, in an order dated 1.7.2025, while referring to Section 11 and Order II Rule 2 of CPC, observed that JIPL's claim for LPS on the CIL compensation is based on an entirely different and distinct cause of action than the CIL compensation. In addition, this Commission, while relying upon its earlier order dated 9.8.2023 in Petition No. 173/MP/2022 (SEIL v APCC & ors), observed the right to claim LPS commence from the date of crystallisation of the same, i.e when the payment of the principal amount is actually realised.
- (c) This Commission in its order dated 21.1.2020 in Petition No. 43/MP/2019, while allowing the claim of carrying cost on a CIL claim in a subsequent petition, held that Section 11 of CPC and Order II Rule 2 prevent a subsequent suit on the same cause of action, but do not bar a suit on a different cause of action and carrying cost and CIL are separate cause of action. The same has been followed by this Commission in its order dated 28.1.2021 in Petition No. 292/MP/2019 (APNRL v WBSEDCL & anr)
- (d) In view of the above submissions, JIPL, in the present case, could not have sought LPS as the same was crystallised only after the principal amount was paid to it by BEST on 3.5.2023 and 11.6.2024. Therefore, the present matter cannot be barred in view of Order II Rule 2 and JIPL is entitled to seek LPS before this Commission.

Re: JIPL is entitled to LPS on account of the delay in payment

- (e) With regard to JIPL's claim on LPS in Petition No.122/MP/2022, this Commission observed that JIPL had submitted all necessary invoices and documents to Discoms therein for the CEEC differential amount and pursued payment through appropriate channels. However, the discoms therein delayed the payment of CIL compensation, and it was paid only on 24.5.2021, without the applicable LPS in terms of the contractual arrangement therein. Further, the Commission also observed that such a delay attracts LPS under clause 18.11(g) of the RFP, for the principal



amount payable to JIPL in terms of the order dated 17.9.2018 in Petition No. 158 /MP/2017.

- (f) The Commission also observed that LPS is meant to ensure timely payments, and becomes applicable upon such delay, as affirmed by the Hon'ble Supreme Court in MSEDCL v MERC (2022) 4 SCC 657. Therefore, JIPL is entitled to LPS under clause 18.11(g) due to the discoms ' delayed payment to JIPL.
- (g) With regard to the Discom's contention that the claim for LPS was not raised in the CIL Petition (Petition No.158/MP/2017), the Commission placed reliance on the Hon'ble Supreme Court judgment in BESCO v Hirehalli Solar Power Project LLP (2025)1 SCC 435 and observed that the Hon'ble Court upheld the APTEL decision to grant LPS even though it was not specifically pleaded before the State Commission, by holding that LPS was explicitly rooted in the contractual terms. In view of the above, the Commission held that the failure of the discoms therein to make the timely payment towards CIL compensation to JIPL amounts to a breach of its contract as well as the direction of this Commission in the order dated 17.9.2018. Accordingly, JIPL is entitled to LPS for the delay in honouring the invoice by BEST in terms of the explicit provisions of the LOI and the EOI read with the Commission's order dated 1.7.2025.

Re: JIPL is entitled to LPS on account of the delay in payment

- (h) The Commission, in its order dated 1.7.2025, allowed JIPL interest on the outstanding LPS till the date of realisation of the same. The Commission, while relying upon its earlier order in Sembcorp (supra), held that denying interest on delayed payments would lead to an unfair and unreasonable outcome for JIPL, and thereby allowing defaulting parties to evade their clear payment obligations by delay in LPS payments, without facing any financial consequence, despite the amounts remaining unpaid for a significant time. Accordingly, JIPL is entitled to interest on the outstanding LPS till the date of realisation of the same.

Re: Conduct of BEST

- (i) BEST has time and again endeavoured to somehow evade its liability to make payment of the change in law compensation, duly and legally payable to JIPL. The conduct of BEST is set out below for ease of reference:
 - (a) It is pertinent to note that BEST, on multiple occasions, has denied the legitimate claims of JIPL in regard to an increase in CEC. Consequently, on being aggrieved by the denial of multiple requests made by TPTCL/JIPL to



BEST, TPTCL and JIPL filed the CIL Petition, which was admitted on 7.9.2017.

(b) Subsequently, this Commission *vide* the CIL orders held that the increase in rate of CEC from Rs. 200/ tonne to Rs. 400/ tonne in terms of the MOF, GOI notification dated 29.2.2016 is a '*Change in Law*' event in terms of Clause 17(E) of the Lol issued by BEST to TPTCL, and JIPL / TPTCL is entitled to recover the differential amount towards CEC for the period 1.3.2016 till 30.7.2017 in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower within 60 days from the date of the order.

(c) However, despite the clear directions given to BEST in the CIL orders by this Commission to make payment of the differential amount towards increase in CEC within 60 days from the date of the order, BEST had willfully and deliberately failed to honour the debit note raised by JIPL and TPTCL, despite there being no stay against the operation and implementation of the CIL orders.

(d) BEST filed an Appeal before the APTEL against the CIL order, along with an I.A. seeking a stay on the implementation or operation of the CIL orders. Due to the non-payment of JIPL invoices, on 17.4.2022, JIPL filed an Execution Petition before this Commission seeking the execution of CIL Orders and for the initiation of proceedings under Section 142 and 149 of the Electricity Act, 2003 against BEST and seeking direction against BEST for payment of CIL claims made by JIPL as per the CIL orders along with LPS. It is significant to highlight that until the filing of the Execution Petition, BEST did not take any proactive steps in pursuing interim relief in the BEST Appeal.

(e) However, it was only after the filing of the execution Petition, BEST filed I.A. No. 1228/2022 for early hearing of its Appeal and I.A No.1088 / 2022 for transfer of BEST Appeal from Court-I to Court-II, but APTEL on 2.9.2022 refused to grant any interim relief, but rather directed BEST to deposit the amount, subject to the outcome of its Appeal. Thereafter, on 16.9.2022, BEST filed R.P. No. 9/2022 before APTEL seeking review of Order dated 2.9.2022 and the same was dismissed by APTEL vide its Order dated 28.10.2022.

(f) Being aggrieved by the said order, BEST filed Civil Appeals Nos. 314-317/2023, which was dismissed by the Hon'ble Supreme Court vide its Order dated 1.2.2023. Even after the dismissal of the Civil Appeal, BEST continued to litigating the legitimate claims of JIPL.



- (g) Upon exhausting the all the remedies available, to somehow evade its liability to make payment towards change in law, BEST once again filed an I.A. No. 447/2023 on 3.3.2023 before APTEL, seeking direction to deposit the amount of Rs. 1.81 crores by way of demand draft, drawn in favour of MOP, GOI with the APTEL or in the alternative with this Commission. The abovementioned I.A. was dismissed by APTEL vide its order dated 17.4.2023 while observing that the order dated 2.9.2022 does not require any clarification and directed BEST to deposit Rs.1.81 crores with JIPL. Accordingly, BEST made a payment of Rs. 1.81 crores to JIPL on 3.5.2023. Thereafter, BEST paid the outstanding dues of Rs. 18,02,018/- (to TPTCL, which was disbursed to JIPL by TPTCL on 11.6.2024. JIPL filed the present Petition on 15.6.2024, immediately after receiving the principal amount from BEST for the invoices raised by it.
- (j) In view of the foregoing, BEST made the partial payment of Rs. 1,81,00,000/ and the remaining balance outstanding dues of Rs. 18,02,018/- were paid by BEST on 11.6.2024 (i.e., *after a lapse of around 2051 days/ around 67 months / around 6 years from the date of issuance of the CIL claim on 5.12.2018*).
- (k) The Hon'ble Supreme Court in *GMR Warora Energy Limited v. CERC and Anr.*, (2023) 10 SCC 401 has reprimanded the conduct of the Discoms for making untimely payment of the CIL compensation, as the same is detrimental to the interest of the end consumers. It was further observed by the Hon'ble Supreme Court that on account of the delay in payment of CIL compensation, the Discoms are liable to pay LPS, which is added to the cost of the electricity supplied to the end-consumers, and thus, it is the end-consumers who suffer by paying higher charges on account of DISCOMs not making timely payment to the generators.
- (l) In view of the above, it is submitted that the maxim *nullus commodum capere potest de injuria sua propria* - meaning no man can take advantage of his own wrong is not applicable towards JIPL's LPS claims; rather, it is BEST who by contending that it is not entitled to pay, is taking advantage of its own wrong.
- (m) In this regard, it is relevant to highlight that BEST was not clearing the invoices raised by JIPL/ TPTCL towards the CIL compensation. JIPL/ TPTCL issued multiple communications/requests to BEST for the clearing of the invoices. Consequently, on being aggrieved by the denial of multiple requests made by TPTCL/JITPL to BEST, TPTCL and JITPL filed the Petition No. 159/MP/2017. Despite the CIL Orders, BEST carried out frivolous litigation to somehow evade its liability to pay CIL compensation. It was only after it exploited all the options to not pay CIL claims to JIPL, it paid



the same on 3.5.2023 and 11.6.2024, in terms of the orders of APTEL and this Hon'ble Commission, respectively. In fact, it is BEST which had wilfully and deliberately failed to honour the debit note raised by JIPL and TPTCL, despite there being no stay against the operation and implementation of the CIL Orders.

Re: JIPL's right to claim LPS reckons from the date of making of principal amount by BEST

- (n) As already highlighted herein above, this Commission in its Order dated 1.7.2025 already held that the right to claim LPS reckons from the date of crystallisation of the same, i.e., upon the payment of the principal amount. The same has also been held by this Commission in an Order dated 9.8.2023 in Petition No. 173/MP/2022 in '*Sembcorp Energy India Limited v. Andhra Pradesh Power Coordination Committee & Ors*'.
- (o) BEST has contended that, according to Clauses 6 and 8 of the EoI, the liability to pay LPS arises from the 31st day after raising the invoices, meaning the cause of action for LPS starts from that date. BEST also relied upon the judgement of the Hon'ble Supreme Court in *APPCC and Ors. v. Lanco Kondapalli Power Ltd.* (2015) SCC OnLine SC 1029, asserting that the principles of the Limitation Act, 1963, apply when this Commission acts as a quasi-judicial authority. Therefore, any claim raised under Section 79(1)(b) and 79(1)(f) of the Electricity Act must adhere to the Limitation Act, and any claim beyond three years is barred from being adjudicated. APTEL in its Judgment dated 2.11.2020 in *PCKL v. UPCL*; 2020 SCC OnLine APTEL 94 held that the limitation period for LPS claims is governed by Article 113 of the Limitation Act, which specifies a three-year period starting from the date when the right to sue accrues.
- (p) In the present case, the principal amount was paid to JIPL in two tranches. BEST paid Rs. 1,81,00,000/- towards the CIL claims on 3.05.2023, and the remaining Rs. 18,02,018/- on 11.06.2024. Thus, JIPL's right to claim LPS for the delay in payment towards CIL claims reckons from 11.6.2024 and can be claimed until 11.6.2027. The present Petition, being filed on 15.6.2024, is well within the period of limitation.
- (q) Further, BEST's reliance on the Lanco Judgment to contend that the Limitation Act applies to disputes between the Discom and the generating companies is misplaced. The facts in the Lanco Judgement are different from those in the present matter, and the Hon'ble Supreme Court in the Lanco Judgement clarified that the Limitation Act does not extend to the administrative or regulatory functions of the Regulatory Commissions. Therefore, BEST's argument does not apply to this case.



- (r) Without prejudice, it is submitted that the LPS claim arises from an ongoing dispute over BEST's unjustified withholding of JIPL's legitimate CIL claims, and such a claim cannot be barred by limitation. Section 3 of the Limitation Act mandates the dismissal of suits filed after the prescribed period, but Section 22 allows for a fresh limitation period if there is a continuing breach of contract or tort. Additionally, in the Udupi Judgment, APTEL clarified that a continuing wrong, which relates to the limitation period for claiming LPS, involves two key elements: it is an ongoing source of injury and holds the wrongdoer accountable for the persistence of that injury.
- (s) Therefore, the present Petition is well within the limitation period as the LPS claim is continuing in nature. Reliance is placed on the Hon'ble Supreme Court's Judgment dated 7.10.2009 in *State of M.P. v. Yogendra Srivastava*; (2010) 12 SCC 538 [Para 18. at S. No. 10 of the Appendix] and *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath*; (1991) 2 SCC 141 [Para 21 at S. No. 11 of the Appendix].
- (t) Further, the provisions of the CPC do not apply to disputes under the Electricity Act's regulatory framework. JIPL's present Petition seeks relief for LPS and interest, which is a separate cause of action. Additionally, in terms of Regulation 111 of the CERC (Conduct of Business) Regulations, 1999, proceedings before this Commission are not strictly governed by the CPC. The Commission has inherent powers under the Electricity Act and its regulations to issue orders to ensure justice.

Re: JIPL is entitled for interest on the outstanding LPS amount till the date of realization of the same

- (u) The APTEL, in its judgment dated 20.9.2021 in Appeal No. 386/2019 (*MSEDCL v MERC & anr*), dismissed an appeal filed by MSEDCL against **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) and that the penal levy contravenes the provisions of the agreement, etc. However, APTEL vide its judgment, upheld the direction of MERC to levy interest on the DPS. The aforesaid judgment of APTEL was challenged before the Hon'ble Supreme Court in Civil Appeal No.6440/2021, wherein the Hon'ble Supreme Court vide order dated 2.3.2022 declined to interfere with the decision of the APTEL on its merits.
- (v) Restitution is a principle of equity which is generally invoked by adjudicatory authorities (such as this Commission) to render substantial justice. The reliance is placed upon the following judgements (i) *Union of India v. Tata Chemicals Ltd.*, (2014) 6 SCC 335, *Indian Council for Enviro-Legal Action v.*



Union of India, (2011) 8 SCC 161 and South-Eastern Coalfields Limited v. State of MP & Ors., (2003) 8 SCC 648.

- (w) Therefore, the JIPL is entitled to interest on outstanding LPS till the realisation of the same. In terms of settled principles and the consistent approach adopted by this Commission, carrying cost/interest is generally allowed 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, till the date of actual payment of the same. However, in the present case, it is submitted that JIPL has not availed any loan for the purpose of arranging the working capital facility, as JIPL was declared as a stressed asset during the power supply period, and the working capital required for the payment of the differential amount towards the CIL claim and the same was made entirely from JIPL's own resources. Accordingly, in the absence of any actual borrowing, the carrying cost/interest ought to be allowed only at the normative rate of interest on working capital, as stipulated under the 2019 Tariff Regulations.
- (x) In view of the above, BEST is liable to pay LPS to JIPL on account of the delay in honouring the invoices raised by JIPL towards the CIL compensation, along with interest. Notably, as on date, JIPL is entitled to Rs. 1,93,35,263 towards LPS and a further interest of Rs. 63,10,117 accrued upon the same up to 19.7.2025, till the date of realisation.

Written submissions of the Respondent BEST

18. Respondent BEST, in its written submissions dated 24.7.2025, mainly submitted as

- (a) JIPL's claim for LPS as sought in the present petition from April 2016 onwards is barred by limitation on account of the following:
- (i) Liability to pay LPS crystallizes from the 31st day of raising invoices (Clause 8 of the EOI), read with Clause 7 of the LOI. Thus, for an invoice of April 2016, the due date will be May 2016 and accordingly, the liability to pay LPS accrued and crystallized from May 2016. In disputes pertaining to the non-payment of LPS, the right to initiate a suit or proceeding arises on expiry of the due date for the payment specified in the bill invoice (MERC order dated 31.7.2024 in Case No. 74/2023 (SJVN Ltd v MSEDCL).
- (ii) The Petitioner had filed the petition claiming a change in law, without making any claim or averment towards LPS. The petition was disposed of vide the Commission's order dated 5.11.2018 without granting any interest. JIPL did not raise the issue of LPS even in the subsequent appeal filed by



BEST against the said order before APTEL. The issue was raised for the first time in the Execution Petition filed in 2022 against the order dated 5.11.2018 i.e after six years from the date of crystallization of LPS. The Petitioner's claim for LPS was rejected in the execution order dated 17.5.2024, since it was considered to be beyond the scope of the petition.

(iii) The Petitioner has raised the claim for LPS through this petition for the first time after almost 8 years. The omission of any reference to LPS at all earlier stages demonstrates that LPS was never a matter of contention or consideration and is rather an afterthought, which is barred by limitation. This also amounts to tacit acceptance to acquiescence (Chairman, SBI & anr v M.J (2022) 2 SCC 301 Para 39

(iv) It is a settled law that a mere representation or correspondence does not extend the period of limitation [State of Tripura v. Arabinda Chakraborty, (2014) 6 SCC 460 - Paras 15 and 18]. Further, in terms of the Henderson Principle enshrining *Order II Rule 2 of the CPC and the principle of constructive res judicata*, the Petitioner ought to have included its entire claim, including that of LPS, in the CIL Petition itself, as it relates to the same cause of action. The underlying question that needs an answer is whether the party could have/ought to have raised the issue before . In the the present case, the answer to this question is in the affirmative, i.e. the Petitioner could have raised the issue of LPS in the original Petition.

(v) The Petitioner's contention that CPC is not applicable to the present proceedings is devoid of any merit, as it is settled law that the Appropriate Commission is always guided by the provisions and principles of the CPC. [Judgement dated 23.3.2023 in Appeal No.334/2021: TPDDL v DERC - Paras 43 and 45].

(vi) The Petitioner's reliance on the Commission's order dated 9.8.2023: Petition No.173/MP/2022 (SEIL v APPCC & ors) is misconstrued and misplaced. In the said case, the Respondents therein neither disputed the amount raised in weekly principal invoices nor denied that there is a delay on their part in making the payments thereof, and this fact formed the basis for the Commission's findings [See: Para 29 @Pg. 33]. Further, there was no specific Petition filed qua the principal invoices in that case. In this case, the genesis lies in BEST's denial and disagreement of the amount raised in the principal invoices and the fact that the CIL Petition was filed by JIPL in furtherance of that dispute for the amount due under the principal invoices.

(vii) The Petitioner's reliance on PCKL v UPCL (2020 SCC On Line APTEL 94), is also incorrect. Unlike the present case, in the said case, there was no initial Petition was filed for the recovery of the principal invoices without a



prayer for LPS. Additionally, the seller therein sent calculations of LPS to the Respondent at the end of each financial year [Para 40-43 @ Pg. 11-12], whereas the Petitioner herein gave the calculation for the first time after six years

(viii) Thus, JIPL's failure to take timely and proactive measures to claim LPS demonstrates a lack of due diligence. JIPL cannot now be allowed to benefit from its own inaction and procedural delays. Thus, the legal maxim *Vigilantibus non dormientibus, jura subveniunt*, which translates to the law assists those who are vigilant, not those who sleep over their rights, applies squarely to this case.

Re: Relief of interest on LPS amounts to a penalty, which is impermissible in law:

(ix) Since the LPS claim in itself is time-barred, the claim of interest thereon becomes impermissible. Without prejudice, LPS is a provision for interest on the delayed payments. Therefore, the Petitioner's claim for interest on the outstanding LPS amount constitutes a claim of 'interest on interest' which is impermissible in law [M/s D. Khosla & Company v. UOI, (Neutral Citation: 2024 INSC 587 - Paras 20, 23 and 24]

(x) Further, neither the EOI nor the LOI provide for LPS on a compounding basis. In the absence of an explicit provision in either the EOI or LOI for LPS on a compounding basis, the same cannot be granted to the Petitioner. [Judgement dated 2.7.2024 in E.P No.11/2023: M/s Clear Solar Pvt. Ltd. v. KERC & ors. @ Pg. 31].

(xi) Additionally, while passing the Sembcorp judgement, this Commission relied upon a decision dated 2.3.2022 by the Hon'ble Apex Court in C.A No.6440/2021 (MSEDCL v. Rajlakshmi Minerals & anr). However, the said decision is an unreasoned order which and therefore could not have been relied upon as a precedent by this Commission [See: Union of Public Service Commission v. Bibhu Prasad Sarangi, 2021 (4) SCC 516 - Para 37] Thus, having been passed on the basis of an order which had no precedential value, the Sembcorp judgment is of no aid to the Petitioner.

Re: The issue involved in the present Petition is not covered by this Hon'ble Commission's Order dated 1.7.2022 in Petition No. 122/MP/2022

(xii) The Petitioner has relied on the Commission's order dated 1.7.2022 in Petition No.122/MP/2022. However, the same is wholly erroneous and divorced from the facts of the present case. In the said case, the Respondents did not contest the amount stated in the weekly principal invoices, nor did they deny that there had been a delay on their part in making payment.



Instead, their primary request was for a waiver of the obligation. In contrast, in the present case, the dispute originates from BEST's explicit denial and disagreement with the amounts billed in the principal invoices. Moreover, it is pertinent to note that JIPL filed the CIL Petition as a consequence of this unresolved dispute regarding the principal invoice amounts, wherein no claim for Late Payment Surcharge (LPS) was raised.

(xiii) Therefore, it is clear that the facts and circumstances in both cases are materially different. In the earlier case, payment liability was not in dispute, whereas in the present matter, the very basis and quantum of the liability have been actively denied since the very beginning. It is well established in law that even a slight variation in facts can significantly affect the precedential value of a judgment. [Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd., (2003) 2 SCC 111]

(xiv) In light of the above, reliance on the prior case is misplaced, as the foundational circumstances are entirely distinguishable.

Analysis and Decision

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

Issue No. (A): Whether the claim of the Petitioner for LPS is barred by Limitation?

Issue No. (B): Whether the claim of the Petitioner for LPS 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. (C): Whether the Petitioner is entitled to the payment of LPS?

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

We now proceed to examine the above issues in the subsequent paragraphs.

Issue No. (A): Whether the claim of the Petitioner JIPL for LPS is barred by Limitation?

20. The Respondent BEST, in its submissions, have contended that the LPS claim raised by the Petitioner is time-barred for the following:

- (a) In terms of Clauses 6 read with Clause 8 of the EOI, the liability to pay LPS crystallised from the 31st day of raising of invoices. Thus, for an invoice of April 2016, the due date will be May 2016 and accordingly, the liability to pay LPS



accrued and crystallised from May 2016. MERC, in its order dated 31.7.2024 in Case No. 74/2023 (SJVNL v MSEDCL), held that in disputes pertaining to the non-payment of LPS, the right to initiate the suit or proceeding arises upon the expiry of the due date for payment specified in the bill invoice.

- (b) In terms of the judgment of the Hon'ble Supreme Court in APPCC v Lanco Kondapalli Power Ltd (2015) SC Online SC 1029, the principles underlying the Limitation Act, are applicable to a Commission, when its functions as statutory authority quasi-judicial /judicial authority in determining all claims or disputes, including those arising out of contract between licensees and generating companies. Whenever any dispute/claim is raised before this Commission under Section 79(1)(b) read with Section 79(1)(f), then the Limitation Act strictly applies, and any claim beyond the period of three years cannot be adjudicated unless the principles of Section 5 and Section 14 of the Limitation Act are satisfied.
- (c) Based on the invoices raised by TPTCL to Respondent BEST, the limitation period for the invoice dated 8.1.2017 (period from 1.3.2016 to 31.7.2016) started on 7.2.2017 and ended on 6.2.2020, and for the invoice dated 4.7.2017 (period 1.12.2016 to 31.12.2016) the limitation started from 3.8.2017 and ended on 2.8.2020. Even assuming that the liability to claim LPS crystallized only upon the Commission's order dated 5.11.2018 in Petition No. 159/MP/2017, even then, the limitation period for the invoice dated 6.12.2018 (period 1.3.2016 to 31.12.2016) started on 5.1.2019 and ended on 4.1.2022.
- (d) Petitioner had raised the issue of LPS for the first time in the Execution Petition filed in 2022, i.e after almost six years from the date of crystallization of LPS. However, the same was rejected by an order dated 17.5.2024, considering it beyond the scope of the present petition.

21. *Per contra*, the Petitioner JIPL has placed on record the tabulated statement of the invoices with respect to CIL compensation on account of Clean Energy Cess (CEC) raised on BEST, for which there has been delayed payment and has contended as under:

- (a) The claims raised by the Petitioner fall within the limitation period, as the right to claim LPS arises only after the liability for LPS is crystallized, i.e upon payment of the principal amount. The period of limitation for the LPS claims will be governed by Article 113 of the Limitation Act (Part X: Suits for which there is no prescribed period), under which the limitation period shall be calculated as three years, from the date on which the right to sue accrues.
- (b) The Commission, in its order dated 9.8.2023 in Petition No. 173/MP2022 (SEIL v APPCC & ors) ('Sembcorp order'), while dealing with a similar issue in regard to the limitation period for the LPS claims, has rejected the argument raised by



the Respondent BEST, that the cause of action to sue for LPS accrues from the 31st day of raising of invoices.

- (c) The reliance placed by BEST upon the Lanco judgment is misplaced and the same is not applicable in the matter. The facts and circumstances of the aforesaid judgment are different from the facts of the present case. The Hon'ble Supreme Court in the said judgment has ruled that the Limitation Act does not extend to the administrative or regulatory functions of the Regulatory Commissions. APTEL affirmed this principle in the case of PCKL v UPCL (2020 SC OnLine APTEL 94 ('Udupi Judgment '))
- (d) The reliance placed by BEST upon the MERC order in the SJVNL case is misplaced and the same is not applicable to the present case. MERC, while passing the order, has not dealt with the Udupi judgment of APTEL (including the Sembcorp order), wherein it was held that the limitation period shall be calculated as three years from the date on which the right to sue accrues or the cause of action.
- (e) BEST paid Rs 1.81 crore towards the principal amount of the CIL claims on 3.5.2023, with the remaining balance of Rs 1802018/- paid on 11.6.2024. Consequently, the Petitioner's right to claim LPS for the delay in payment begins from 11.6.2024, i.e., the date on which the full CIL payment was completed, thereby providing the Petitioner with a fresh cause of action to pursue LPS claims.
- (f) In respect of the invoices dated 9.4.2016, 17.5.2016 21.9.2016, 4.7.2017, the period of limitation from the date of payment (3.5.2023) expires on 3.6.2026 and in respect of the invoice dated 5.12.2018, the period of limitation from the date of payment of the balance principal amount (11.6.2024) expires on 11.6.2027, as per Section 113 of the Limitation Act.

22. We have examined the rival contentions on the issue of limitation, and find that the objections raised by the Respondent BEST are misconceived. With regard to the applicability of the Limitation Act for LPS, the APTEL in Udupi Judgment (Appeal No. 10 of 2020 & batch titled Power Company of Karnataka Ltd. v. Udupi Power Corporation Ltd.) has decided as under:

175. The argument that Article 25 occurring in Part-I of the Schedule to Limitation Act, 1963 applies to the present dispute involving specific issue of LPSC itself is wrong. There is no specific limitation period specified for claiming LPSC in Schedule to the Limitation Act, 1963. Accordingly, even in cases where there is no running account, the period of limitation for LPSC claims will have to be governed by Article 113 of Limitation Act, 1963 (Part X- Suits for which there is no prescribed period), which provides the limitation period as three years computed from the date on which the "right to sue accrues" which is same as the date on which the "cause of action" arises.



23. Though the findings in the Udupi Judgment were challenged before the Hon'ble Supreme Court in Civil Appeal No. 838 of 2021 (PCKL v. UPCL), the same was dismissed vide order dated 8.2.2022, on the ground that there was no substantial question of law that merited consideration.

24. In the present case, the CIL order dated 5.11.2018, passed by the Commission allowing the change in law claims of the Petitioner, was challenged by the Respondent BEST before APTEL in Appeal No. 3/2019, which refused to grant a stay of the operation of the CIL order dated 5.11.2018. Also, the direction of APTEL dated 2.9.2022 to the Respondent BEST to deposit the amount, which is subject to the outcome of the appeal, was challenged by the Respondent by way of a Review (RP No.9/2022), which was dismissed by APTEL on 28.10.2022. Further, the Civil Appeal filed by the Respondent against this order was also dismissed by the Hon'ble Supreme Court on 1.2.2023. Thus, BEST, after exhausting all remedies, filed IA before APTEL seeking directions to deposit Rs 1.81 crore, which was disposed of by APTEL on 17.4.2023, directing BEST to deposit Rs. 1.81 crore with the Petitioner JIPL, which was deposited on 3.5.2023. Taking note of the fact that BEST had not fully complied with the CIL order, the Commission vide its order dated 17.5.2024 in the Execution Petition No. 139/MP/2022, after directing JIPL to raise a revised invoice for the outstanding dues, considering the payments already made, instructed both parties to reconcile the remaining dues within 30 days. As regards the claim for LPS/interest, the Commission held that the same was not considered as it was not raised in the CIL Petition. Accordingly, BEST had made payment of the outstanding balance dues of Rs 1802018/- to JIPL on 11.6.2024. It is therefore evident that the principal amount was paid by BEST to JIPL in two tranches viz, 3.5.2023 and 11.6.2024 and accordingly, the "right to sue accrues" for the Petitioner in respect of its LPS claims,



begin to run only when there is a default on the part of the Respondent BEST in making the payment of LPS as per the terms of EOI, which can only be subsequent to the crystallization of the LPS liability, i.e. date on which the payment towards the invoices was made by the Respondent. In other words, the cause of action/right to sue, for JIPL to claim LPS for the delay in the payment of the entire CIL claims, arose from 11.6.2024 (till 11.6.2027) in terms of Article 113 of the Limitation Act. Even if we were to consider that part of the LPS liability stood crystallized upon the part payment of the principal amount by the Respondent BEST on 3.5.2023, the claim of the Petitioner for LPS, considering the fact that the present Petition was filed by JIPL on 15.6.2024, would also fall within the period of limitation. It is pertinent to mention that applying the same principle laid down by APTEL in the said Udipi judgment, the Commission in its Sembcorp order dated 9.8.2023 held as under:

“29. In the present circumstances, the “right to sue accrues” for the Petitioner in respect of its LPS claims can begin to run only when there is a default on the part of the Respondents in making the payment of LPS as per the terms of POs, which can only be subsequent to the crystallization of the LPS liability of the Respondents, i.e. date on which the payment towards weekly invoices was made by the Respondents. It is observed that the Petitioner has calculated the period of limitation from the date on which the liability to pay LPS was crystalized itself, i.e., the date on which the complete payment towards weekly invoices was made by the Respondents...”

25. Further, Clauses 6 and 8 of the EOI provide as under:

6. Payment: BEST shall make payment to supplier in Suppliers bank account by RTGS within 30 days from the receipt of correct bills, which will be the due date”

8. Surcharge for delayed payment: Any delay in payment beyond the due date on all outstanding amount will attract 1.25% surcharge per month. This surcharge would be calculated on a day to day basis for each day of the delay after due date.”

26. Thus, in terms of the above, payment had to be made by BEST to JIPL within 30 days of the receipt of the invoices, which is the due date, and each ‘breach’ by the Respondent BEST due to non-payment of the invoices beyond the due date, attracted a surcharge of 1.25% per month, calculated on a day-to-day basis for each day of the delay, after the due date. Admittedly, in the present case, there has been a breach of the contract



by BEST, due to the non-payment of regular invoices/debit notes raised by JIPL along with surcharge (for each day's delay), in respect of the power supplied to it, during the period from March, 2016 till December, 2016, in terms of the EOI and the LOI. In other words, the imposition of a surcharge @1.25% per month, calculated on a day-to-day basis, would only mean that the said imposition is continuous in nature and thus each day entails a fresh cause of action. As such, the 'breach' by BEST created a continuing source of injury, thereby satisfying the first element of 'continuing breach'. Since BEST consistently defaulted in paying the invoices and LPS/Surcharge, there has been a 'continuous and recurring disobedience' and non-compliance with the terms of the EOI/LOI. The 'breach' being recurring, the second element of 'continuing breach' is satisfied. It is pertinent to mention that with regard to the claim for LPS being a 'continuing wrong', APTEL in its Udupi Judgment held that a "continuing wrong" includes a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. Further, the APTEL has held that every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings and that the default of the distribution licensee to pay the LPS partakes the character of a continuing breach as contemplated under Section 22 of the Limitation Act. Relevant extracts of the Udupi judgment are as under:

"207. We uphold the submission that, in the facts and circumstances presented before us, the elements of "continuing breach" are satisfied. Indisputably, there have been breaches of the contract on account of the non-payment of regular monthly bills and invoices towards infirm power and LPSC by the ESCOMs in terms of the PPA as well as Regulations. Each 'breach' by the ESCOMs resultantly burdened Udupi Power with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of 'continuing breach'. Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. The 'breach' being recurring, the second element of 'continuing breach' is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic.



208. For the foregoing reasons, we uphold the submission of the second respondent that the default of ESCOMs in paying against monthly tariff bills as well as LPSC partakes the character of a “continuing breach” as contemplated under Section 22 of the Limitation Act, 1963. Thus, “a fresh period of limitation begins to run at every moment of the time during which the breach continues”. Since the breach continues on account of continued refusal to discharge liability towards LPSC, a fresh cause of action is constituted so long as the breach is recurrent and continues.”

27. Placing reliance on the said judgment on ‘continuing breach’, the Commission vide its order dated 7.11.2023 in Petition No. 270/MP/2022 (SEIL v TSPCC & ors) and order dated 17.7.2025 (Shree Cement Ltd v TSPCC & ors), rejected the contentions of the Respondents therein (that the period of limitation is considered to commence after the expiry of 30 days from the weekly energy invoices remaining unpaid and placing reliance on the Udupi judgment), held that the liability of the LPS for the delay in payment is a continuing cause of action. Each day of non-payment gives rise to a fresh cause of action. With regard to Respondent BEST’s reliance on the MERC order in the SJVNL case, we note that the facts in the present case are different from the facts in the said case. Also, the principle propounded by ATEL in the Udupi judgment with regard to the period of limitation for LPS claims, as followed by the Commission in the Sembcorp order, has not been taken note of or considered by MERC in the said case. The Respondent BEST has contended that the Commission’s Sembcorp order and the APTEL Udupi judgment are not applicable to the present case, keeping in view that the background facts which formed the basis of the decisions thereunder are different from the facts in the present case. This contention of the Respondent, though attractive, cannot be entertained. Though the facts in those cases slightly differ from the facts in the present case, all the cases mentioned herein relate to the levy of LPS on account of the delay/part payment of the principal amounts, as in the present case. Hence, the decision/principles propounded by APTEL in the Udupi judgment and followed by the Commission in the Sembcorp order, with regard to the levy of LPS on the delayed payments and the applicability of Limitation



towards such LPS claims in terms of Art. 113 of The Schedule of the Limitation Act, including the 'breach of contract' giving rise to a character of a continuing wrong under Section 22 of the Limitation Act, cannot be side-stepped, and is squarely applicable to the present case. The contentions of the Respondent BEST, on this count, merit no consideration.

28. Hence, the failure of the Respondent BEST to discharge their liability towards LPS partakes the character of a continuing breach, which gives a fresh cause of action, so long as the breach is recurrent and continues, and therefore, such claims of the Petitioner cannot be held to be time-barred. The plea of the bar of limitation, as raised by the Respondent BEST, is not tenable and is accordingly rejected. Issue (A) is decided accordingly

29. The Petitioner has additionally pleaded that the LPS claim falls within the 'regulatory function' of the Commission and, therefore, the limitation would not apply. However, since in the aforesaid paragraphs, we have already held that the LPS claim of the Petitioner is not barred by limitation, we do not find any need to separately deal with the above submissions in the present case.

Issue No(B): Whether the claim of the Petitioner is barred by the principles of constructive res judicata as well as Order II Rule 2 of the Code of Civil Procedure, 1908?

30. The Respondent BEST has contended the following:

- (a) that the present claim for LPS is barred under the doctrine of *constructive res judicata* and Order II Rule 2 of the CPC, 1908. The Henderson principle, which is a corollary to constructive res judicata, applies squarely to the present matter. The principle prohibits the abuse of judicial process arising from a party's failure to present its complete case during the initial proceedings and subsequently attempting to raise points that could and should have been argued earlier.



- (b) Merely because a subsequent proceeding appears to differ in procedural or factual aspects does not exempt it from the application of the Henderson principle, particularly where the underlying subject matter or core issues remain substantially similar.
- (c) In the present case, JIPL never sought LPS during the earlier proceedings, nor did it pursue such relief at any appellate stage. Therefore, relitigating the same issue through this present Petition is an abuse of the process. By failing to seek LPS at the appropriate time and forum, JIPL has waived its right to pursue such relief now.
- (d) As per Order II Rule 2 of CPC, a plaintiff must include its entire claim related to a specific cause of action in one lawsuit. If the Plaintiff intentionally or unintentionally omits a part of the claim, it cannot file a separate suit for it afterwards. JIPL intentionally sought not to bring its claims for LPS for 6 years. Since it did not include the whole of its claim when it filed the CIL Petition, it cannot now split the cause of action into parts by filing a separate petition. JIPL has omitted certain reliefs which might have been available to it, at the time of filing of the CIL Petition and after relinquishing the same, it cannot file a separate petition as the same is barred under Order II Rule 2 of CPC (Reliance placed on the judgment of the Hon'ble Supreme Court in SBI v Gracure Pharmaceuticals Ltd (2014) 3 SCC 595.
- (e) Even after passing the CIL order dated 5.11.2018, JIPL did not file fresh legal proceedings to seek LPS, but instead sent a letter dated 5.12.2018 to TPTCL requesting TPTCL to recover Rs. 2.01 crore along with applicable surcharge from BEST. Subsequently, TPTCL vide its communication to BEST on 6.12.2018 requested BEST to release Rs.19902018/- along with applicable surcharge. Notable LPS was claimed without any supporting detailed calculation. JIPL resorted to repeated correspondences-seemingly as an attempt to circumvent the limitation period and keep the limitation clock running. It is a settled position of law that mere representation or correspondence does not extend the period of limitation. (State of Tripura v Arabinda Chakraborty (2014) 6 SCC 460.
- (f) JIPL, being aware of its alleged right to claim LPS chose not to exercise the same till much later. It cannot be allowed to file a fresh petition on an old, time-barred cause of action now, as the same would be prejudicial to BEST and would cause grave injustice to it.

31. In response, the Petitioner JIPL has submitted the following:

- (a) In Petition No. 122/MP/2022, the Discom had contended that the JIPL's claim for LPS is barred under Order II Rule 2 of CPC, as it arises from the same cause of action that was adjudicated by this Commission in Petition No. 158/MP/2017. Notably, even in the present Petition, BEST has raised similar contentions



(applicability of Order II Rule 2 of CPC) and the application of the Henderson Principle and Doctrine of constructive res judicata, to the present matter.

(b) This Commission vide its order dated 1.7.2025, while referring to Section 11 and Order II Rule 2 of CPC, observed that the JIPL's claim on LPS on the CIL compensation is based on an entirely different and distinct cause of action than the CIL compensation. In addition, this Commission, while relying upon its earlier order dated 9.8.2023 in Petition No. 173/MP/2022 observed that the right to claim LPS commences from the date of crystallization of the same, i.e when the payment of the principal amount is actually realized.

(c) This Commission in its order dated 21.1.2020 in Petition No. 43/MP/2019 (Prayartana Developers Pvt Ltd v NTPC) while allowing the claim of carrying cost on a CIL claim in a subsequent petition held that Section 11 and Order II Rule 2 of CPC prevent a subsequent suit on the same cause of action, but do not bar a suit, based on a different and distinct cause of action, and carrying cost and CIL claims are a separate cause of action. The same has been followed by this Commission in its order dated 28.1.2021 in Petition No. 292/MP/2019 (APNRL v WBSEDIL & anr)

(d) In view of the above, JIPL could not have sought LPS, as the same was crystallized only after the principal amount was paid to it by BEST on 3.5.2023 and 11.6.2024. Therefore, the present matter cannot be barred in terms of Order II Rule 2 of CPC and JIPL is entitled to seek LPS before this Commission.

32. We have examined the above submissions. The grievance of the Petitioner emanates from the non-payment/delay in payment of the invoices by the Respondent BEST, pursuant to the Commission's order dated 5.11.2018 in Petition No. 158/MP/2017. According to the Respondent BEST, the 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 1908, and also in light of constructive res-judicata under Section 11 of the CPC, 1908. The Respondent has also submitted that since the Petitioner omitted to claim LPS in the main Petition and in the appeal, 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 right to claim LPS arises only after the liability for LPS is crystallized, i.e., upon the payment of the principal amount, and since LPS is a continuous liability



applicable throughout the EOI/LOI period, such ongoing and subsisting cause of action is not barred by Order II Rule 2 of the CPC, 1908. In this regard, it is pertinent to refer to the provisions of Section 11 as well as Order II Rule 2 of the CPC, 1908.

33. 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.

34. 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.”

35. A plain reading of the aforementioned provisions of the CPC, 1908 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 CPC, 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 party could have been taken a plea 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.

36. The object of Order II Rule 2 of the CPC, 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 CPC, 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.

37. In the present case, the claim of the Petitioner for LPS on the CIL compensation is premised on an entirely different and distinct cause of action than its claim for the CIL compensation. The former is premised on the Respondent BEST's failure to make the payment of the invoices raised towards the CIL compensation and cannot be said to be a ground of attack/claim that is essentially connected with or incidental to the CIL determination involved in Petition No. 158/MP/2017 filed by the Petitioner. Similar objection was raised by the Respondent therein (UPPCL) in Petition No.122/MP/2022 filed by the Petitioner JIPL, seeking payment of LPS for the delayed payment of its invoices, and the Commission vide its order dated 1.7.2025, observed that the "right to sue" in relation to the LPS claims, 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. The findings of the Commission on this issue are squarely applicable to the present case. We have, in this order (paras 24 to 29 above), while considering the question of limitation raised by the Respondent BEST, held that there is a 'continuous breach' of the provisions of the EOI/LOI for the non-payment of JIPL invoices by BEST and the 'right to sue' in relation to the LPS claims, crystallized from the date on which the payment towards the invoices was made by the Respondent BEST. Therefore, the contention of the Respondent that the present Petition is barred by constructive res judicata and Order II Rule 2 is not tenable. In view of the foregoing, we reject the contentions of the Respondent BEST and 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 the Petitioner is therefore entitled to the reliefs. Issue No. (B) is answered accordingly.



Issue No. (C): Whether the Petitioner is entitled to the payment of LPS?

38. The next issue for consideration is the Petitioner's entitlement to LPS, on account of the delay in honouring the invoices raised by the Petitioner towards CIL compensation (increase in CEC), along with interest up to the date of realization of LPS. The Petitioner has submitted that on the basis of the CIL orders, it had, vide letter dated 5.12.2018, informed TPTCL that the differential amount recoverable from BEST towards CEC works out to Rs 20131983/- as per the actual coal consumption and Rs 19902018/- as per the operational parameters in accordance with the applicable 2014 Tariff Regulations, respectively. Accordingly, as directed by this Commission, the lower of the aforesaid two values was considered, i.e Rs 19902018/-, and therefore BEST was liable to pay the said amount along with applicable LPS. The Petitioner has submitted that only after protracted frivolous litigations, the Respondent BEST, on 3.5.2023 (i.e. after a lapse of around 2581 days/around 85 months/around 7 years from the date of issuance of the CIL claims), made a partial payment of Rs.18100000/- and the remaining outstanding dues of Rs.1802018/- was paid by BEST on 11.6.2024 (i.e. after a lapse of around 2051 days / around 67 months/around 6 years from the date of issuance of the CIL claim vide letter dated 5.12.2018). Admittedly, the Petitioner has filed the present Petition seeking a direction on BEST to make the payment of LPS amounting to 37996613/- (as on 14.6.2024) in respect of the delay in payment of the differential amount towards the increased CEC for the period 1.3.2016 till 30.6.2017, in terms of the Commission's order dated 5.11.2018 in Petition No. 158/MP/2017. The Petitioner contends that it is entitled to LPS in terms of Clause 8 of the EOI, read with Clause 7 of the LOI (dated 14.1.2016), along with interest, till the date of realization of the LPS amount. *Per contra*, the Respondent BEST has argued that there was neither any mention nor discussion of LPS in the CIL petition or the CIL order dated 5.11.2018, and the Petitioner did not also raise



the issue of LPS even in the appeal filed by BEST (against the CIL order dated 5.11.2018) before APTEL. Accordingly, the Respondent has contended that the attempt of the Petitioner to claim LPS constitutes an afterthought and is therefore barred by limitation.

39. We have considered the submissions of the parties. Clauses 6 and 8 of the EOI provide as under:

“6. Payment: BEST shall make payment to supplier in Suppliers bank account by RTGS within 30 days from the receipt of correct bills, which will be the due date”

8. Surcharge for delayed payment: Any delay in payment beyond the due date on all outstanding amount will attract 1.25% surcharge per month. This surcharge would be calculated on a day to day basis for each day of the delay after due date.”

40. Similar provisions exist under Clause 6 and Clause 7 of the LOI dated 14.1.2016. The Commission, in its order dated 5.11.2018, held that the LOI dated 14.1.2016 constitute a legally binding contract between TPTCL and BEST for the supply of power from the generating station of JITPL in Odisha to BEST. Accordingly, the Commission in its order dated 5.11.2018, held that the Petitioner is entitled to recover from the Respondent, the differential amount towards CEC as CIL compensation, for the period from 1.3.2016 till 30.6.2016, in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per applicable tariff regulations or actuals, whichever is lower. However, the Commission, while holding that the increase in the levy of CEC qualifies as a ‘change in law’ event in terms of clause 17(E) of the LOI, directed that the Petitioner is entitled to be compensated for the supply of power to BEST in terms of the LOI. The relevant portion of the order dated 5.11.2018 is extracted below:

“35.....BEST has enjoyed the benefit of firm supply of such power by JITPL through TPTCL during the relevant period. In such a situation, the Petitioners have the right to be compensated by BEST for the non-gratuitous act incurring additional expenditure on account of increase in rates of Clean Energy Cess for supply of power to BEST in terms of the Lol. We hold that the Petitioners are entitled to be compensated for the additional expenditure incurred by them for payment of differential amount of Clean Energy Cess on coal for supply of power to BEST.”



41. The Commission also directed the Petitioner to furnish, along with the bills, the proof of payment of CEC, duly certified by the Statutory Auditors, and both parties to carry out reconciliation on account of these claims and make the payments within 60 days from the date of the order. It is noted that following the CIL order dated 5.11.2018, JIPL vide its letter dated 5.12.2018, requested TPTCL to recover the amount of Rs 19902018/- from BEST, along with the applicable LPS. It also furnished the requisite documents, which *inter alia*, included the Auditor's certificate, Grid Report and the actual invoices raised by MCL. Further, TPTCL vide its letter dated 6.12.2018, requested the Respondent to release the said payment, along with the applicable surcharge, enclosing therewith all the requisite documents for the power supplied from 1.3.2016 to 31.7.2016. Also, vide letters dated 18.5.2019/ 27.5.2019, JIPL/TPTCL called upon the Respondent to reconcile the amount payable towards the increase in CEC. Despite the clear directions in the CIL order dated 5.11.2018 for payment of the differential amount, the Respondent failed to honour the invoices/debit notes raised by JIPL/TPTCL. Also, in the Appeal No. 3/2019 filed by the Respondent challenging the operation of the CIL order dated 5.11.2018, no stay order was/is in operation. Despite this, the request of the Petitioner JIPL vide its letter/invoice dated 30.5.2024 for LPS/interest, due to the delay by the Respondent in settling the CIL claims, was effectively not honoured by the Respondent vide its email dated 31.5.2024. It is only after the Respondent exhausted all its remedies, *albeit* unsuccessfully, by filing review against the interim direction of APTEL and before the Hon'ble Supreme Court, challenging the interim direction (*to deposit the CIL amount, subject to the outcome of the appeal*), the Respondent made the payment of Rs 1.81 crores to JIPL on 3.5.2023 and the balance outstanding amount of Rs 1802018/- on 11.6.2024.



42. Though the Respondent BEST has submitted that the time taken to pursue the legal remedy cannot be considered as delay, we note from the chronology of events, that the Petitioner/TPTCL had raised relevant invoices/debit notes on the Respondent along with the requisite documentary proofs, for payment of the CEC differential amounts, but the Respondent avoided its responsibility of making such payments, despite (i) there being no APTEL order of stay of operation of the CIL order dated 5.11.2018 (ii) APTEL's interim direction dated 2.9.2022 to make the payments to JIPL (subject to the result of the appeal). It is only after the dismissal of the Civil Appeal by the Hon'ble Supreme Court, on 1.2.2023, that the Respondent BEST made the Principal CIL compensation payments in tranches, i.e., Rs.1.81 crore on 3.5.2023 and the balance amount of Rs. 1802018/- on 11.6.2024. In our view, the payment of the total principal amount on 11.6.2024, by the Respondent, after a prolonged delay, without the accompanying surcharge (LPS), is in our view, contrary to the spirit of Clause 8 of the EOI. Needless to add, the same has already been held as a change in law event vide the CIL order dated 5.11.2018. It is a settled position of law that carrying cost is payable as per the provisions of the PPA to compensate the affected party for the time value of funds deployed on account of change in law events [Ref: UHBVNL & anr. v Adani Power Limited & Ors. (2019) 5 SCC 325]. It is also noteworthy to refer to the judgment of the Hon'ble Supreme Court in MSEDCL. v. MERC (2022) 4 SCC 657, wherein the Hon'ble Court observed that the objective of LPS is to secure the timely payment, and LPS becomes applicable in the event of a delay in the actual payment. The relevant portion of the order is extracted below:

"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.”

43. The aforesaid principle was reaffirmed by the Hon’ble Supreme Court in *MSEDCL v. AP(M)L & 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 the invoices raised by the generators. Relevant paras are extracted below:

“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.”

44. With regard to the payment of ‘interest’ from the date when the amount in question became due, *APTEL* vide its judgment dated 29.8.2025 in Appeal No.267/2016 (*GRIDCO v BPSC & ors*) held as under:

*69. We may note that payment of “interest” cannot be equated to payment of penalty or fine. “Interest” is normal accretion to money when invested lawfully by the person in whose hands it is. When a person is deprived of the use his money to which he is lawfully entitled, he would have a legitimate claim for interest upon such amount of money for the period during which he was deprived of its use. In other words, any person who has enriched himself by use of the money belonging to some other person, is legally duty bound to compensate the latter by payment of interest on the said money, from the use of which he had been deprived. Payment of interest is a necessary corollary to the return on money retained by a person unjustly or unlawfully. This has been explained by the Hon’ble Supreme Court succinctly in *Alok Shanker Pandey v. Union of India & Ors.* (2007) 3 SCC 545 by way of the following illustrations: -*

“For example, if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B. With these observations the impugned judgment is modified and the appeal is disposed of accordingly.”

45. Thus, in our view, LPS is a contractual right that arises upon default in the payment of invoices, within the due date. The intent behind incorporating the LPS clause in an agreement is to enforce/encourage the timely payment of bills within the stipulated time.



The rate of LPS is also provided in the agreement to avoid the time-consuming exercise of assessing the losses of individual power-generating companies by reason of late payment of bills. Having said so, we now examine the Respondent's contention that the LPS claim of the Petitioner is an afterthought and violates the principles of procedural fairness and judicial finality. In this regard, we refer to the judgment of the Hon'ble Supreme Court in the case of BESCO Ltd. v. Hirehalli Solar Power Project LLP, [(2025) 1 SCC 435], wherein the Hon'ble Court upheld the APTEL's judgment in granting LPS, despite the same not having been pleaded before the Karnataka Electricity Regulatory Commission (KERC), on the basis that LPS is explicitly rooted in the provisions of the contract therein. The relevant para of the judgment is extracted below:

"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."

46. Further, APTEL in its judgment in the Udupi case (supra) observed as under:

Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. The 'breach' being recurring, the second element of 'continuing breach' is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic.

47. In light of the above decisions, the failure of the Respondent BEST, to make the timely payments towards CIL compensation to the Petitioner JIPL, in terms of the Commission's order dated 5.11.2018, amounts to a breach of its contract (EOI/LOI) as well as the direction of the Commission in the said order. In our view, the Petitioner's right to claim LPS for the delay in payment of the CIL compensation arose on 3.5.2023 and 11.6.2024, i.e., when the LPS stood crystallized, upon receipt of the compensation payments from the Respondent, BEST, in tranches, as stated above. In an order dated



5.11.2018, the Commission held that the Petitioner is entitled to compensation on account of the increase in the CEC, in terms of Clause 17(E) of the LOI, and hence, there is no justification for excluding LPS from its ambit.

48. The Petitioner has submitted that it is entitled to Rs 19335263/- (as on 19.7.2025) towards LPS and has enclosed an Excel sheet, with respect to the calculation of the LPS amount, which is marked as Annexure-A (colly) to the written submissions dated 19.7.2025. Accordingly, the Petitioner's claim for LPS is allowed up to the date of the actual payment of the principal amounts by the Respondent, BEST. The Petitioner, JIPL, and BEST are directed to reconcile the aforementioned amount, within 30 days of this order and make the payment of the aforesaid outstanding LPS amounts to JIPL, within a period of 60 days from the date of this order. Needless to say, the LPS claims allowed as above to JIPL are subject to the final decision of APTEL in the appeal filed by the Respondent, which is pending. Issue (C) is disposed of accordingly.

Issue No. (D): Whether the Petitioner is entitled to interest on the outstanding LPS amount till the actual date of payment?

49. Having held that the Petitioner is entitled to LPS due to the delayed payments of the principal amounts by BEST, as above, we proceed to examine whether the Petitioner is entitled to 'interest' on the said LPS amounts, till the actual date of payment. In this regard, the Petitioner has submitted as under:

(a) APTEL vide its judgment dated 20.9.2021 in Appeal No. 386/2019 (MSEDCL v MERC & anr) dismissed the appeal filed by MSEDCL, challenging the direction of MERC, to pay the penal interest on the outstanding delayed payment surcharge, to the wind power generator. The aforesaid judgment was challenged by MSEDCL before the Hon'ble Supreme Court in C.A. No. 6440/2021, and the Hon'ble Court, vide order dated 2.3.2022, declined to interfere with the decision of APTEL.

(b) Restitution is a principle of equity which is generally invoked by the adjudicatory authorities to render substantial justice. Reliance placed on the judgments of the



Hon'ble Supreme Court in Union of India v Tata Chemicals Ltd (2014) 6 SCC 335, Indian Council for Enviro Legal Action v UOI (2011) 8 SCC 161 and SECL v State of MP & ors (2003) 8 SCC 648.

(c) In terms of the settled principles and the consistent approach adopted by this Commission, carrying cost /interest is generally allowed at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's certificate) or at the rate of interest on working capital, as per the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations 2019 or the LPS rate as per the LOI/RFP, whichever is lower, till the date of actual payment of the same.

(d) In the present case, JIPL has not availed any loan for the purpose of arranging the working capital facility, as it was declared as a stressed asset during the power supply period, and the working capital required for payment of the differential amount towards the CIL claim was made entirely from JIPL's own resources. Accordingly, in the absence of any actual borrowing, the carrying cost/interest ought to be allowed only at the normative rate of interest on working capital, as stipulated under the 2019 Tariff Regulations.

50. *Per contra*, the Respondent BEST has contended as under:

- (a) LPS is a provision for interest on delayed payments. Therefore, the Petitioners' claim for interest on outstanding LPS amount constitutes a claim for 'interest on interest' which is impermissible in law [Ref: M/s D. Khosla & Co v UOI (2024 INSC 587)], Neither EOI nor LOI provide for LPS on a compounding basis. In the absence of an explicit provision in either the EOI or the LOI for LPS on a compounding basis, the same cannot be granted (Ref: APTEL judgment dated 27.2.2024 in EP No. 11/ 2023: M/s Clean Solar Pvt Ltd v KERC & ors)
- (b) LPS is charged for the non-payment within a stipulated period. Clearly, LPS amounts to interest of a penal nature and therefore cannot be capitalised, i.e., cannot be added to the principal amount for claiming the additional interest. Therefore, the Petitioner's claim for interest on the outstanding LPS amount is opposed to public policy and unsustainable in law.
- (c) The Commission has relied upon the decision dated 2.3.2022 of the Hon'ble Supreme Court in C.A No. 6440/2021. However, the said decision is an unreasoned order which, therefore, could not have been relied upon as a precedent by this Commission. Thus, having been passed on the basis of an order which has no precedential value, the Sembcorp judgment is of no aid to the Petitioner.



51. We have examined the rival submissions. While the Petitioner has relied upon the APTEL's judgment in Appeal No.386/2019 (as considered in the order dated 1.7.2025 in Petition No.122/MP/2022) to substantiate its claim for interest on the outstanding LPS amount, the Respondent BEST has relied on the Hon'ble Supreme Court's judgment in 'D. Khosla case' and the APTEL judgment in 'Clear solar case' to argue that the said prayer of the Petitioner cannot be granted. In our considered view, the reliance placed by the Petitioner on the APTEL judgment in Appeal No. 386/2019 is not applicable to the present case, as in the said case, MSEDCL had caused a massive delay in the admitted payments (on account of the Principal amounts and DPC) to the Respondent therein (M/s Rajalakshmi Minerals), as per the plan submitted to MERC, thereby giving rise to the levy of 'interest' on LPS/DPC by MERC, which was affirmed by APTEL and subsequently considered in the Commission's order dated 1.7.2025 in Petition No.122/MP/2022. It is pertinent to mention that in the said order dated 1.7.2025, the Commission had interpreted the term 'all dues' mentioned in Clause 18.11 of the RfP therein, to encompass all amounts, including the outstanding LPS and hence, it was decided that the Respondent therein (UPPCL) was liable to pay the interest on the principal sum adjudged, which included LPS. This is not so in the present case, wherein the Petitioner has challenged the CIL order dated 5.11.2018 before APTEL and only in terms of its interim order dated 2.9.2022, the outstanding principal amounts were paid in tranches by BEST on 3.5.2023 and 11.6.2024, hereby resulting in the crystallisation of the LPS amount. As per Clause 8 of the EOI/ Clause 7 of the LOI executed by the Petitioner herein, any delay in payment beyond the due date, on all the 'outstanding amount' will attract a 1.25% surcharge per month, to be calculated on a day-to-day basis, for each day of the delay, after the due date. In our view, the term 'outstanding amount' referred to in Clause 8 would mean only the 'outstanding principal amount' payable by the Respondent BEST for



the supply of power under the LOI and does not include, within its ambit, any other amounts. Section 34 of the CPC provides that where the decree is for payment of money, the court may order interest at a rate as the court deems reasonable to be paid on the principal sum adjudged. The reading of the sub-section (1) of Section 34 CPC would reveal that the interest is payable on the principal sum adjudged and not on the interest part of the award. Further, Section 3(3) of the Interest Act, 1978 provides that nothing in Section 3, which permits the court to award interest, shall empower the court to award interest upon interest. In other words, ordinarily, the courts are not entitled to award interest upon interest, unless specifically provided either under any statute or under the terms and conditions of the contract. In the present case, there is no provision in the EO/LOI for the grant of interest upon interest to the Petitioner. In *State of Haryana & ors v S.L. Arora & Co* (2010) 3 SCC 690, it was observed that interest, unless otherwise specified, refers to simple interest and that interest is payable only on the 'principal amount' and not on any accrued interest. It was further held that the compound interest can be awarded if there is a specific provision under the statute or in the contract for compounding of interest, but no general discretion lies with the courts or tribunals to award compound interest or interest upon interest. The reliance made by the Respondent on the Hon'ble Supreme Court judgment in '*D. Khosla's case* (relating to an arbitration award) is squarely applicable to the present case, wherein it was observed that the power of the courts to grant interest on interest is subject to the power conferred under the statute or under the terms and conditions of the contract. The relevant portion of the order is extracted below:

"23. There is no dispute as to the power of the courts to award interest on interest or compound interest in a given case subject to the power conferred under the statutes or under the terms and conditions of the contract but where no such power is conferred ordinarily, the courts do not award interest on interest."



24.. Neither the Act specifically empower the Arbitrator or the court to award interest upon interest or compound interest nor there is any other provision which provides for grant of compound interest or interest upon interest. Even Section 34 of CPC is silent in this regard whereas subsection (3) of Section 3 of the Interest Act specifically prohibits the same.

xxx

27.... The 'amount awarded' refers to the principal amount of compensation awarded that is Rs.21,56,745/-. The award and the decree nowhere specifically contemplate for awarding 15% interest per annum on the amount awarded including the interest component i.e. the pre-award interest. **This could not have been done even otherwise as there is no provision to that effect under the relevant statutes or the contract.** No material has been placed before us or as a matter of fact before any court below to show that the terms and conditions of the contract contained any such provision."

52. In the light of the above decisions and considering the fact that the EOI/LOI do not provide for the grant of interest on interest or compounding interest, the relief sought by the Petitioner, on this count, is rejected. Accordingly, we hold that the Petitioner is not entitled to any interest on the outstanding LPS amount.

Summary

53. To summarize:

(a) Petitioner JIPL's claim for LPS is allowed up to the date of the actual payment of the principal amounts by the Respondent, BEST. This is, however, subject to the final decision of APTEL in Appeal No. 3/2019 filed by Respondent, BEST.

(b) Respondent, BEST, shall pay the LPS amount to the Petitioner, JIPL, 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 the invoices, for the CEC differential amount till 11.6.2024.

(c) Petitioner, JIPL, and the Respondent, BEST, shall carry out joint reconciliation of the LPS amount thereon, on the above basis, within 30 days from the date of this order.

(d) Upon completion of the reconciliation, BEST shall ensure full payment of the reconciled LPS amount, within 60 days from the date of this order.

(e) Petitioner JIPL's claim for interest on the outstanding LPS amount stands rejected.



54. Based on the above discussions and findings, Petition No. 253MP/2024 is disposed of.

Sd/-
(Ravinder Singh Dhillon)
Member

Sd/-
(Harish Dudani)
Member

Sd/-
(Ramesh Babu V.)
Member

Sd/-
(Jishnu Barua)
Chairperson

