

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 249/MP/2022

Coram:

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

Date of Order: 23rd March, 2026

In the matter of:

Petition for seeking direction to the Respondents to pay capacity charges and interest on delay in payment of capacity charges and energy charges in terms of PPA dated 31.3.1997.

And

In the matter of:

M/s Lanco Kondapalli Power Limited,
Plot No.4, Softsol Building, Software Units Layout,
HITEC City, Madhapur, Hyderabad – 500081

.....Petitioner

Vs.

1. Andhra Pradesh Power Coordination Committee,
Vidyut Soudha, Eluru Road, Vijayawada- 520004,
Andhra Pradesh.
2. Transmission Corporation of Andhra Pradesh Ltd.,
Vidyut Soudha, Eluru Road, Vijayawada- 520004,
Andhra Pradesh.
3. Southern Power Distribution Company of Telangana Ltd,
11-5-423/1/A, First Floor, Singareni Collieries Bhavan, Lakdi-Ka-Pul,
Hyderabad 506001.
4. Southern Power Distribution Company of Andhra Pradesh Ltd.,
Upstairs, Hero Honda Showroom, Renigunta Road,
Tirupati 517501.
5. Northern Power Distribution Company of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor, 1-7-668, Postal Colony, Hanamkonda,
Warangal 506001
6. Eastern Power Distribution Company of Andhra Pradesh Ltd.,
50-27, TPT Colony, Visakhapatnam 530013

.....Respondents



Parties Present:

Shri M.G. Ramachandran, Senior Advocate, LKPL
Shri Sanjay Sen, Senior Advocate, LKPL
Ms. Mandakini Ghosh, Advocate, LKPL
Ms. Neha M. Dabral, Advocate, LKPL
Shri Saurabh Gupta, Advocate, LKPL
Shri Puneet Yadav, Advocate, LKPL
Shri Akshansh Gupta, Advocate, LKPL
Ms. Swapna Seshadri, Advocate, Andhra & Telangana Discoms
Shri Anand K. Ganesan, Advocate, Andhra & Telangana Discoms
Ms. Aishwarya, Advocate, Andhra & Telangana Discoms
Shri Harsha, Advocate, Andhra & Telangana Discoms

ORDER

The Petitioner, Lanco Kondapalli Power Limited (in short 'LKPL'), has filed this Petition under Section 79 (1)(f) of the Electricity Act, 2003 ('the Act'), seeking the following reliefs:

- (a) Allow the present Petition and direct that the pleadings in OP No. 33 of 2009 (renumbered as OP No. 27/2015) as filed before the Andhra Pradesh Electricity Regulatory Commission be taken on record by this Hon'ble Commission.*
- (b) Declare / hold that the Petitioner Company is entitled for Capacity Charges of Rs.76.18 Crores as per the provisions of Power Purchase Agreement dated 31.3.1997 and consequently direct the respondents 1 to 6 to pay 78.16 Crores as claimed vide Bill Nos. 3A, 4A, SA, 6A, 7A, and 8 for the period from 21.01.2000 to 01.01.2001;*
- (c) Declare / hold that the Petitioner Company is entitled for interest of Rs. 86,35,87,699/- for delay in payment of Capacity Charges and Energy Charges for the Bill Nos. 3A, 4A, SA, 6A, 7A, and 8 in terms of Power Purchase Agreement dated 31.3.1997 from 9.2.2001 till the date of filing of this Petition and consequently direct the respondents 1 to 6 to pay the same;*
- (d) Direct the Respondents to pay interest on Rs.78.16 Crores and Rs. 86,35,87,699/- at working capital interest rate from the date of this Petition till the date of realization; and*
- (e) Pass any other or further order/reliefs which this Hon'ble Commission may deem fit and proper in light of justice, equity and good conscience.*

Background of the case

2. The Petitioner, LKPL, is a company incorporated under the Companies Act, 1956, inter alia, engaged in the generation and sale of electricity. It has set-up a 368.144 MW Combined Cycle Power Project located in the Kondapalli Industrial Development Area, Krishna District, Andhra Pradesh. It is a short-gestation power



plant completed in time, out of the six projects awarded through Tariff Based International Competitive Bidding by the Government of Andhra Pradesh (GoAP)/ Andhra Pradesh State Electricity Board. LKPL executed PPA with the erstwhile APSEB (presently APTRANSCO) on 31.3.1997 for the purchase of all the available capacity, in accordance with the terms and conditions of the said PPA. LKPL implemented the project, and the first generating unit was tested from 22.6.2000 to 26.7.2000, and with the COD of the first unit declared on 26.7.2000. Similarly, the COD of the second generating unit was declared on 24.9.2000, after testing. Subsequently, LKPL demonstrated the project's total capacity as per the provisions of the PPA on 25.10.2000, in the presence of APTRANSCO and NTPC officials (deputed by APTRANSCO), and the project's COD was declared on 25.10.2000. Thereafter, vide G.O.Ms. No. 59 dated 7.6.2005, Respondent No. 1, Andhra Pradesh Power Corporation Committee (APPCC), was constituted to advise and guide the other four distribution companies in the discharge of their functions.

3. As disputes arose between the parties due to the failure of the Respondent, AP Discoms, to make the payments to LKPL, in terms of its invoices raised for the period 15.9.2000 and 11.1.2001, and the efforts to settle the same amicably, was not responded to by the Respondents, LKPL issued notice on 26.3.2004, nominating Justice B.P. Jeevan Reddy, as its arbitrator and requested the Respondents to nominate their arbitrator. As the Respondents failed to settle the disputes through negotiation or arbitration, LKPL filed an application before the Hon'ble Andhra Pradesh High Court for the appointment of an arbitrator. However, the Hon'ble High Court disposed of the said application on 18.3.2009, granting liberty to LKPL to approach the Andhra Pradesh Electricity Regulatory Commission (APERC) for appropriate relief. Accordingly, LKPL filed O.P. No. 33/2009 before the APERC, seeking the reliefs (b) to (d), as in para 1 above. However, the APERC, vide order dated 13.6.2011, dismissed



the said Petition holding that the period spent by LKPL in the arbitration proceedings could not be excluded under Section 14(2) of the Limitation Act. Aggrieved by this order, LKPL filed Appeal No. 129/2011, before the Appellate Tribunal for Electricity (APTEL) and the APTEL, after examining the issue of limitation held vide judgement dated 2.7.2012, that the claim of LKPL cannot be said to be barred by limitation and directed the refund of the capacity charges along with interest, in terms of its findings. It also directed the APERC to pass consequential orders in terms of the said judgement. Against this judgement, the Respondent Discoms filed Civil Appeal No. 6036/2012 before the Hon'ble Supreme Court, and the Hon'ble Court, without going into the merits of the claims, rejected the said appeal filed by the Discoms, vide its judgment dated 16.10.2015, thereby upholding the APTEL judgement on the question of limitation.

4. Pursuant to the Andhra Pradesh Reorganisation Act, 2014 (w.e.f. from 1.3.2014), apart from the AP Discoms (Respondents 4 & 6), the Telangana Discoms (Respondents 3 & 5) succeeded the rights and obligations under the PPA to the part contracted capacity, viz., 335 MW. These Respondents are collectively referred to as 'Respondent Discoms', in this order. Subsequently, this Petition (O.P. No. 33/2009) was renumbered as O.P. No. 27/2015. The Respondents have filed their counter affidavit on 3.12.2013, and the Petitioner has filed its rejoinder on 20.12.2013. During the pendency of this Petition, the Hon'ble Supreme Court in C.A. Nos. 3788-3790/2019 (APEPDCL & anr v GMRVPGL & ors) vide order dated 4.2.2020, upheld the jurisdiction of the Central Commission to decide the cases involving the disputes between the Respondent Discoms and the Generating Company. In this regard, the Telangana State Electricity Regulatory Commission (TSERC), vide its order dated 29.5.2021, transferred the various Petitions to this Commission, in addition to Petition O.P. No. 27/2015. Thereafter, this Commission vide letter dated 10.8.2021, called upon the



Petitioner to take steps to file the Petition, along with the filing fees in terms of the Conduct of Business Regulations of this Commission. In this background, the present Petition has been filed by LKPL on 17.12.2021, claiming the reliefs, as mentioned in para 1 above. LKPL has submitted that it has been admitted into the Corporate Insolvency Resolution Process (CIRP) vide order dated 23.4.2019 and thereafter, admitted into liquidation vide NCLT (Hyd. Bench) order dated 16.4.2021.

Submissions of the Petitioner

5. LKPL, in support of the reliefs sought, has submitted the following:

(i) As per Article 2 of the PPA, LKPL is under an obligation to sell the entire capacity of the project to the Respondents from the COD of the first generating unit, and the Respondents are under an obligation to purchase the said capacity. Similarly, LKPL shall sell, and the Respondents shall purchase, all energy units generated during testing prior to the COD of such unit, for the consideration of the energy charge.

(ii) LKPL has tested the said generating units of the project in accordance with the test procedures provided in Schedule F of the PPA. LKPL can alone declare the COD of the generating units, upon completion of the performance acceptance test in accordance with the said schedule. The Respondents had never disputed the performance of the first and second generating units of the project. However, APTRANSCO informed LKPL that the testing is permitted pending resolution of the PPA and commercial issues and sought the interference of the GoAP. As a matter of fact, no commercial issues are pending except the implementation of the PPA, and GoAP has no role to play in its implementation, except for providing certain guarantees for the Respondents' obligation under the PPA. The said pending issues are not relevant to the declaration of COD for the units.

(iii) LKPL is entitled under the terms of the PPA for the capacity charges from the COD of each generating unit and also for the energy units generated during the testing of the units. Therefore, LKPL furnished bill Nos. 3A dated 19.9.2000 for Rs. 3,94,57,811/-, 4A dated 15.9.2000 for Rs. 8,14,91,927/-, 5A dated 12.10.2000 for Rs. 12,15,50,816/-, 6A dated 13.11.2000 for Rs. 21,75,89,908/-, 7A dated 11.12.2000 for Rs. 25,81,61,291.15 and 8 dated 11.1.2001 for Rs. 26,62,07,310/- towards capacity charges in accordance with the provisions of the PPA. However, APTRANSCO failed to pay Rs. 76,18,13,282/- against the said bills.



(iv) As APTRANSCO did not respond to LKPL's claims, it issued a notice dated 8.9.2003 as per Article 14.1 of the PPA for the settlement of disputes, which includes the present claim. APTRANSCO, vide its letter dated 24.9.2003, replied to the said notice, expressing its willingness to discuss and settle the pending issues and requested LKPL not to seek reference to arbitration for the resolution of the disputes until final settlement. After waiting for a month in anticipation of resolving the disputes, LKPL issued a letter dated 14.10.2003 nominating its company secretary for an amicable settlement of the disputes raised in the notice dated 8.9.2003 and requested APTRANSCO to nominate its representative. However, there was no response from APTRANSCO to resolve the issues under Article 14.1 of the PPA.

(v) LKPL, having complied with the provisions of Article 14.1, and having waited sufficiently long, issued notice of arbitration dated 26.3.2004 under Article 14.2 of the PPA and nominated Justice B.P. Jeevan Reddy (Retd. Judge of the Hon'ble Supreme Court) and requested APTRANSCO to nominate its arbitrator within 30 days in terms of the Arbitration & Conciliation Act. After the appointment of the arbitrator, APTRANSCO, vide its letter dated 27.3.2004, requested LKPL to hold discussions on 12.4.2004 to resolve the disputes. APTRANSCO, vide letter dated 8.4.2004, expressed its intention not to appoint its arbitrator. LKPL, vide its letter dated 10.4.2004, requested APTRANSCO to appoint its arbitrator; in response, APTRANSCO, vide its letter dated 19.4.2004, requested LKPL to attend the meeting on 26.4.2004, disregarding LKPL's nomination of the arbitrator.

(vi) As there was no response from the Respondents to nominate the arbitrator, LKPL approached the Hon'ble Andhra Pradesh High Court for the appointment of an arbitrator on behalf of APTRANSCO. The Hon'ble High Court vide its order dated 18.3.2009, disposed of the said application (AA No. 31/2004), permitting the parties to approach the APERC under Section 86 (1) (f) of the Electricity Act, 2003.

(vii) LKPL has bona fide and, in accordance with the dispute resolution mechanism provided in the PPA, pursued its remedy to recover the capacity charges payable under the provisions of the PPA. The Respondents had never disputed the bills submitted by LKPL claiming capacity charges. According to the terms of the PPA, the amount is due on the 25th day after the bill is submitted to the Respondents. The Respondents are liable to pay interest on the capacity charges payable to LKPL at the working capital rate from the due date of the payment until the date of reimbursement, as per Article 5.7 of the PPA. Therefore, LKPL is entitled to interest at the working capital rate on the amount due.

(viii) LKPL is also claiming interest on the amounts due by the Respondents at the working capital interest rate, with quarterly rests till 31.3.2002 and thereafter, with monthly rest, as applied by its working capital lender. The said



interest is calculated from 1.1.2001. Accordingly, LKPL is entitled to an interest of Rs. 86,35,87,699/- as on the date of this Petition. A certificate containing the interest rates issued by SBI, the working capital lender to LKPL, has been filed along with the Petition.

Hearing dated 14.2.2023

6. The Petition was admitted on 14.2.2023, and the Commission, after issuing notice to the Respondents, directed the parties to complete their pleadings in the matter. In compliance with the directions, the Respondent Discoms filed their replies vide separate affidavits dated 20.3.2023.

Reply of the Respondent Discoms

7. The Respondent Discoms, in their reply, have submitted the following:

(i) LKPL in the present Petition has wrongly stated the claim period as 21.1.2000 to 1.1.2001, which should be corrected as 27.7.2000 to 1.1.2001. Aggrieved by the APTEL judgement dated 13.6.2011 in Appeal No. 129/2011, the Respondents filed Civil Appeals before the Hon'ble Supreme Court, which was dismissed vide judgement dated 16.10.2015. Due to subsequent events, the remand matters got transferred to this Commission for passing consequential orders.

(ii) From the observations of the Hon'ble Supreme Court in paras 2,4,6,7 & 11 of its judgement dated 16.10.2015 in the said Civil Appeal 6036/2012 & Batch (APPCC & ors v LKPL & ors) in relation to capacity charge claims between the parties, this Commission is required to examine the claims of LKPL on the correctness or validity of capacity charges for decision in accordance with law. The Hon'ble Court also noted that LKPL declared COD of this project as 25.10.2000, but this date was not accepted as a COD by APTRANSCO. It also recorded that, *"However, Lanco continued to generate power and deliver it to grid"*. The Apex Court also noted that, *"it raised bills from 19.9.2000, which the charges for energy delivered were accepted, the bill for capacity charges were disallowed on the ground that it was not in accordance with the PPA"*.

(iii) As recorded by the Hon'ble Supreme Court, APTRANSCO did not accept the COD of LKPL declared on 25.10.2000. It is clear that there was no consensus ad idem between the parties on the COD date declared by LKPL. Since the project COD was not accepted by APTRANSCO, the issues arose from the date LKPL commenced supplying electricity to APTRANSCO from its project, and APTRANSCO continued to pay both the capacity charges and energy charges.



(iv) For ascertaining the commencement date of supply of electricity to APTRANSCO by LKPL, the Respondents pray that this Commission may refer to paras 3 (vii), 5.8 & 29 of the APTEL judgement dated 12.1.2015 in Appeal No. 154/2013, between the same parties in respect of the same PPA. The intention for referring to the said judgement is only to cull out the date of taking power from LKPL's project by APTRANSCO as per the GoAP directions, which was 2.1.2001. From 2.1.2000 onwards, LKPL was paid the full capacity charges as well as energy charges for the power delivered by its project.

(v) The next issue to be considered is the duration of the PPA with LKPL and how long LKPL supplied power to the AP Discoms. This is a vital issue that it needs to be considered as a subsequent event, which has an impact on the rights and obligations of the Respondents. Article 6 of the PPA with LKPL stipulated the term of the agreement as 15 years from the project COD. Since the AP Discoms started taking power from LKPL from 2.1.2001 and paid the full capacity charges and energy charges from that date, this date was deemed as the project COD date for reckoning the PPA duration. In such a case, the PPA with LKPL was expiring on 1.1.2016.

(vi) LKPL supplied power to the Respondent Discoms up to 1.1.2016, in terms of the PPA, and LKPL recovered its capacity charges from 2.1.2001 to 1.1.2016, viz., for the entire PPA duration. Assuming without admitting that if the project COD was 25.10.2000 as claimed by LKPL, in such a case, the PPA tenure would have completed by 24.10.2015 itself, and LKPL would not have been in the position to claim capacity charge up to 1.1.2016 as per PPA duration. In fact, this should be seen as merely shifting the project COD date from 25.10.2000 to 2.1.2001. As such, allowing the claim of LKPL would be tantamount to double payment of capacity charges, which is not permissible.

(vii) Subsequent to the completion of the PPA tenure, LKPL approached the AP Discoms for renewal of the PPA, and the State Commission issued an interim order dated 8.8.2018, clearly recording that the PPA with LKPL expired on 1.1.2016. This clearly establishes that LKPL accepted the project COD as 2.1.2001 and supplied power to the Respondent Discoms to 1.1.2016. Therefore, there is no merit in LKPL's claim for the capacity charge, since it has fully recovered it.

(viii) It is evident from Article 5.1. of the PPA that only energy charges for all the energy units generated prior to COD of the unit shall be payable and no capacity charges shall be payable for such energy. Since, LKPL fully recovered its capacity charges for the entire PPA duration (2.1.2001 to 1.1.2016), therefore, the claim for capacity charges for the period of generation prior to 2.1.2001 is not tenable, in terms of the PPA.

(ix) The COD of the individual units/project COD declared by LKPL was not accepted by the APTRANSCO, as also recorded by the Apex Court, on account of the abnormally delayed achievement of the same by 834 days from SCOD.



However, LKPL recovered the capacity charges for the entire PPA tenure, and therefore, no prejudice was caused to LKPL.

(x) In terms of the judgements of the Hon'ble Supreme Court in Kedar Nath Agarwal (D) & anr v Dhanraj Devi (D) & anr dated 13.10.2004 and Gaya Prasad v Shri Pradeep Srivastava, dated 7.2.2001 and subsequent events which have a material bearing on the entitlement/ obligation of the Respondents, the same would need to be considered by this Commission. In this case, the PPA with LKPL expired on 1.1.2016, which is a subsequent event. This deemed the project COD to be 2.1.2001, since the PPA duration was 15 years from the project's COD. This subsequent issue was not under consideration with APTEL while remanding the matter vide order dated 2.7.2012 in Appeal No. 129/2011. In view of the subsequent event having an impact on the claim of LKPL, the ratio decided in the aforesaid cases would need to be applied for examining the claim of LKPL and upon such application, it will not survive, much less the interest claim.

Rejoinder of LKPL

8. LKPL, in its rejoinder dated 10.4.2023, has submitted the following:

Date of COD

(i) As regards the date of COD, the Respondents are absolutely mistaken in their understanding that COD would be taken as the date from which the Respondents started drawing energy. The entire rationale behind the provision for the capacity charge is that the generator must be compensated for the maximum capacity it injects into the grid, notwithstanding the fact that the entire capacity is not consumed.

(ii) A perusal of Article 1.1 (13) of the PPA with regard to the COD makes it clear that the Respondents have no role whatsoever to play in the declaration of COD. It is the Petitioner who shall declare the COD from the date that the generating unit becomes operational, irrespective of the date that the Respondents may choose to start drawing energy from such unit. The only precondition is that the Petitioner must have completed its performance acceptance test in accordance with the test procedures outlined in Schedule F.

(iii) Schedule F provides that the test results shall be conducted in accordance with standard international test codes in the presence of designated representatives from each party. Post conclusion of the test, the Petitioner is required to publish the test results demonstrating the levels of performance and declare COD if the generating unit has passed the performance acceptance test.

(iv) The first generating unit was tested during 22.6.2000 to 26.7.2000, thus the Petitioner successfully declared the COD of the said unit on 26.7.2000. Similarly, the COD of the second unit was declared on 24.9.2000 after testing.



Subsequently, on 25.10.2000, the Petitioner demonstrated its total project capacity as per the provisions of the PPA, in the presence of APTRANSCO and NTPC officials deputed by APTRANSCO for this purpose, and declared the COD of the project on 25.10.2000.

(v) While the Respondents have sought to challenge the COD by stating that there was no consensus ad idem on the date of commissioning, the fact of the matter is that the Respondents have never disputed the results of the performance acceptance test conducted by the Petitioner, and thus, the COD declared by the Petitioner must be accepted as the relevant date. The PPA does not envisage the non-recognition of the COD by the Respondents, except to the extent of referring the matter to the Independent Engineer, in case of any dispute with the test results. This was admittedly never done.

(vi) The disputes raised by the Respondents regarding the declaration of COD do not pertain to any issues with the test results, but pertain to the alleged delays in the commissioning of the project and vague and baseless objections calling upon the Petitioner to seek governmental approval for the PPA and commercial issues. Regarding the alleged delays in commissioning the project, the Petitioner's position is that there was no delay whatsoever. In fact, the APTEL in Appeal No. 154/2013 categorically held that certain delays in the project could be attributed to the occurrence of a force majeure event.

(vii) As regards getting governmental approval, the PPA does not, in any manner, obligate the Petitioner to seek approval of the Government on the PPA to declare COD. The only requirement for declaring COD is the successful completion of the performance acceptance test. Having passed the performance acceptance test, the Petitioner has no additional obligations to achieve COD.

(viii) Thus, the COD of the first generation unit is 26.7.2000, and that of the second generation unit is 24.9.2000, and the COD of the total capacity of the project is 25.10.2000. Immediately thereafter, the Petitioner started to generate power and deliver it to the grid, as recorded in APPCC v LKPL (2016) 3 SCC 468.

Duration of the PPA

(ix) The submission of the Respondents that counting 2.1.2001 as the COD, as the PPA completed its tenure on 1.1.2016 and that they have been paying the capacity charge and energy charge during this period is admittedly a new ground, which was not raised in the pleadings before the State Commission. The Respondents cannot, in law, raise additional grounds in the present proceedings, which have been transferred from the State Commission. The Respondent have not made out a case for amending the counter, and the Petitioner reserves its right to address submissions. Without prejudice, the Petitioner proceeds to deal with the said submissions on the merits.

(x) As stated above, the COD of the project is 25.10.2000. Thus, the calculation of 15 years for determining the project duration would be based on 25.10.2000. In this regard, the PPA should have expired on 25.10.2015. However, as the events transpired, the Respondents continued to draw energy from the project under the PPA and make due payments on the bills raised thereunder. Thus, the parties, by continuing to perform their obligations under the PPA as before after its termination, can be deemed to have extended its operation by conduct.

(xi) The Respondents cannot approbate and reprobate at the same time. The Respondents cannot enjoy the benefits under the PPA by drawing energy throughout the period between 25.10.2000 and 1.1.2016; energy has been duly supplied to the Respondents, for which energy charge has been paid in accordance with the PPA. Thus, the PPA's period of operation would be from 25.10.2000 to 1.10.2016. The Petitioner's claim is in terms of the PPA, and the Respondents are liable to pay the same. Therefore, the Petitioner is entitled to the payment of unpaid capacity charges for the period from 25.10.2000 till 1.1.2001.

Hearing dated 21.7.2023

9. This petition was listed along with similar other petitions filed by LKPL against the Respondent discoms (batch cases). During the hearing, the learned counsel for LKPL referred to the order dated 23.6.2023 of the NCLT, Hyderabad, in IA Nos. 830/2023 and 839/2023 in CP(IB) No. 678/7/ HDB/ 2018, and submitted that there has been a change in the ownership of LKPL to M/s Radha Vasavi Assets LLP. Accordingly, the Commission adjourned the hearing and allowed LKPL to file a fresh Vakalatnama, along with short submissions, and the Respondents to file their responses. In response, LKPL has filed its written submissions vide affidavit dated 4.10.2023.

Written Submissions of LKPL

10. LKPL, in its written submissions, has mainly reiterated its submissions made in the main Petition and the rejoinder filed therein. With regard to the declaration of the COD on 26.7.2000 (first unit), 24.9.2000 (second unit) and 25.10.2000 (project COD), LKPL has furnished the documents viz letter dated 28.6.2000 requesting APTRANSCO for testing of the first gas turbine of the plant, letter dated 31.7.2000 declaring COD of first generating unit, letter dated 31.7.2000 along with joint inspection



of the gross generating capacity of gas turbine no. 2, in open cycle mode of test conducted on 26.7.2000, letter dated 27.9.2000 along with joint inspection of the gross generating capacity of gas turbine no. 1 in open cycle mode of test conducted on 24.9.2000 and letter dated 28.10.2000 demonstrating the total capacity of the project on 25.10.2000, in presence of APTRANSCO and NTPC officials deputed by APTRANSCO for this purpose, and COD of the project declared on 25.10.2000.

Hearing dated 25.10.2023

11. During the hearing of this petition, along with the batch cases, the Commission, while granting time to the Respondents to file their written submissions, sought certain other additional information. In compliance with the said directions, LKPL and the Respondents have filed the additional information on 1.12.2023 and 18.12.2023, respectively. The Respondent Discoms vide affidavit dated 27.1.2024 filed its written submissions, mainly reiterating their submissions in its reply / additional information. However, the Respondents have referred to the judgment of the Hon'ble Supreme Court in APTRANSCO v GMRVPGL & ors (2018) 3 SCC 716, and submitted that, when the parties by their conduct have put a particular interpretation of the agreement, the same is binding and there is no requirement of any further inquiry as to the actual interpretation.

12. Thereafter, these petitions, along with the batch cases, were listed on various dates, viz., 29.11.2024, 18.10.2024 and 18.11.2024 and the hearings were adjourned for various reasons.

Hearing dated 6.2.2025

13. During the hearing, the parties requested that the present petition, along with the batch matters, be specially listed for hearing. The Commission, after directing the parties to file their note of submissions (not exceeding four pages), including the



question of referring the matters to arbitration, specially fixed the matter for hearing. The Petitioner and the Respondents have filed their written notes of submissions vide their affidavits dated 10.3.2025 and 20.3.2025, respectively.

Note on submissions of LKPL

14. LKPL, in its written note of submissions, mainly reiterated its submissions made in the Petition/Rejoinder/Written submissions (dated 4.10.2023). In addition to this, LKPL submitted the following:

Limitation and Arbitration

(i) As regards the allegation of the Respondent Discoms that the claims prior to September 2001 is time barred, the entire period till the filing of OP No. 42/2009, by LKPL on 18.3.2009 is required to be excluded as bonafide, prosecuting with due diligence, a proceeding in arbitration/other forums, as provide in Section 14 of the Limitation Act, 1963.

(ii) Disputes had arisen between the parties in 2000-01, owing to the non-payment of the bills raised by LKPL. LKPL then issued a notice dated 8.9.2003, invoking arbitration in accordance with Article 14.2 (a) of the PPA. LKPL nominated an arbitrator, but the Respondent Discoms did not appoint an arbitrator. LKPL then approached the Hon'ble High Court of Andhra Pradesh and filed AA Nos. 18 & 31/2004.

(iii) Pursuant to the legal position settled by the Hon'ble Supreme Court in its judgement date 13.3.2008 in GUVNL v EPL (2008) 4 SCC 75, the Hon'ble High Court on 18.3.2009, disposed of the arbitration applications, granting liberty to LKPL to approach the State Commission for appropriate reliefs. Accordingly, LKPL filed a Petition (OP No. 42/2009) before the APERC, which was subsequently transferred to this Commission.

(iv) Thus, the entire duration starting from the date of notice invoking arbitration i.e. the time bonafide spent by LKPL, with due diligence and good faith, in pursuing the remedy available under Article 14.2 of the PPA read with the provisions of Arbitration & Conciliation Act, 1996, till 18.3.2009 is liable to be excluded in terms of the Limitation Act, 1963 (*Judgement of Hon'ble Supreme Court in APPCC v LKPL [(2016) 3 SCC 468] was relied upon*).

(v) In terms of the APTEL judgement dated 2.7.2012 in Appeal Nos. 128 & 129/2011, has held that the claims of LKPL are within the limitation. The present claim forms part of the claims made in the arbitration notice dated 8.9.2003, as in the case of claims in OP Nos. 33 & 18/2009.



(vi) The present petition involves issues relating to tariff, i.e., entitlement of LKPL to the capacity charges from 26.7.2000 onwards, and such issues have to be decided by the Commission and cannot be referred to arbitration in terms of the APTEL decision in MPPMCL v DVC case dated 25.10.2024 in Appeal No.309/2024. The Hon'ble Supreme Court vide its order dated 4.2.2020 in APEPDCL V GMRVPGL & ors held that as the controversy involves the States of Andhra Pradesh and the State of Telangana and the ultimate effect is going to be in more than one state, considering the AP Reorganisation Act, 2014. The Commission is the appropriate authority to hear and decide the dispute. On merits also, there is no case for the Respondent Discoms to deny the payment of capacity charges as mentioned.

Written Submissions of Respondent Discoms

15. The Respondent Discoms have submitted the following:

The present case does not fall within the scope of matters referable to arbitration

(i) The prayers in the present petition relate to the payment of capacity charges by the Respondents. The main dispute is the tariff to be paid to LKPL after the PPA term ends and before the COD of the units, where the COD is contested. The question is whether the liability to the power injected before the COD is only the energy charge or also the capacity charges. Therefore, the dispute concerns the determination of charges payable before the COD of the project and during the period when the PPA was renewed after its initial term had expired.

(ii) The dispute relates to the interpretation of the tariff (Article 3- capacity and energy payments) and Billing (Article 5- Billing and payments) provision of the PPA dated 31.3.1997, as amended. The above disputes directly relate to the tariff payable and, therefore, cannot be referred to arbitration in light of the DVC case. If there is an impact on the tariff of the consumers, Section 79(1)(f) read with Section 79(1)(a) or (b) will be exercised and not under any arbitration clause.

Compliance with Section 8 of the Arbitration & Conciliation Act, 1996

(iii) The legal framework governing arbitration is summarised as follows: if there is a valid arbitration clause in an agreement between the parties, and either party invokes it at the outset, before filing their first statement addressing the substance of the dispute, the court is required to refer the matter to arbitration. However, at a later stage in the proceedings, the matter can only be referred to arbitration with the mutual consent of the parties. This would also be applicable only if the dispute can be categorised as a non-tariff dispute.

(iv) The dispute in the case pre-dates the enactment of the Electricity Act. LKPL initially filed an arbitration application before the Andhra Pradesh High Court in 2004, prior to the constitution of the State Commission. Following the formation of the State Commission, the matter was referred to it, in accordance with the High Court's order dated 18.3.2009. With the bifurcation of the State, the matter was transferred to this Commission. It would be unjust for parties, having spent



several years litigating in one forum, to be compelled to restart the proceedings at the final disposal stage.

DVC case decision cannot be applied to create another route for reference to the arbitration de hors Section 8 of the Arbitration Act

(v) The discretionary power of the Commission under the second part of Section 79(1)(f) of the Act to refer the matter to arbitration does not create another route for reference of a dispute de hors Section 8 of the Arbitration Act. Once the parties have waived their right to arbitration due to non-compliance with Section 8, then the relevant forum, which is this Commission in this case, must decide the case before it. The DVC case does not ipso facto provide that the matter other than the determination of tariff will be outside the adjudicatory jurisdiction under Section 79(1)(f).

This Commission continues to exercise subject-matter jurisdiction under Section 79 of the Electricity Act

(vi) It is not that there is an inherent lack of jurisdiction in this Commission to decide a dispute that involves a generating company and or a licensee under Section 79 of the Act. In fact, a limited exception has been created by the APTEL judgment to refer certain disputes for arbitration if they pertain to non-tariff aspects. If indeed this Commission lacked jurisdiction, there was no reason for APTEL to appoint an arbitrator. The Hon'ble Supreme Court has affirmed the APTEL judgement, and all that the DVC judgement does is to carve out an exception for non-tariff disputes.

Hearing dated 13.5.2025

16. During the hearing, the learned Senior counsel for LKPL, pointed out to its written submissions and submitted that the issues raised in the batch petitions, relate to tariff and are, therefore, not referable to arbitration, in the light of the APTEL judgement dated 25.10.2024 in MPPMCL v DVC (Appeal No.309/2024) as affirmed by the Hon'ble Supreme Court. At the request of the parties, this petition (Petition No.249/MP/2022) was heard, and the Commission, after directing the Respondents to file certain additional information/submissions and for LKPL to file its response, reserved its order. The Respondents have filed their additional submissions vide affidavit dated 3.7.2025, and LKPL has filed its response dated 12.7.2025.

Additional submissions of the Respondents

17. The Respondents have, in their additional information, clarified the following:



(i) The main reason for the non-acceptance of COD declared by LKPL was the delay with which LKPL sought to declare COD, and that in a unilateral manner. It is clear from the title of the PPA that it was for the Short Gestation liquid fuel-based Power Project of 355 MW (ISO), and as such, on-time commercial operation of the project was a critical requirement for the Respondent Discoms. Under Article 1.1.54 of the PPA, LKPL was required to commission the project within 16 months (by July 1998). However, LKPL sought to declare the COD on 25.10.2000, with a 27-month delay. As per Article 1.1 of the PPA, the project COD was the COD of the last generating unit, and the COD could be declared only when both units were commissioned.

(ii) Subsequent to the completion of both units by LKPL, there were ongoing disputes and discussions between LKPL and GoAP, and the Discoms, in relation to reasons for the delay in COD and levy of Liquidated Damages (LD)- as per the MoM dated 18.12.2000. LKPL was claiming force majeure on account of the sinking of the turbine in the sea, while the Respondent Discoms disputed the same, since the incident occurred after the SCOD. Copy of the Communication from 22.6.2000 to 2.1.2000 between the parties is enclosed as Annexure A.

(iii) In accordance with Article 2.3 of the PPA, the energy supplied by LKPL prior to 2.1.2001 was treated as infirm power and the corresponding Energy Charges Rate (ECR) was paid to LKPL. Separately, the GoAP had recommended to the MoPNG the allocation of natural gas to the gas-based project in the combined State of AP, since the PPA provided for the operation of the project with natural gas. Hence, LKPL obtained 1.64 MMSCMD allocation of natural gas from MoPNG to operate the project. In light of this and directions from GoAP, the Respondent Discoms accepted the project COD as 2.1.2000, pending settlement of issues in relation to payment of LD (as per letter dated 5.1.2001).

(iv) In any case, the term of the PPA was 15 years from the project COD (Article 6.1). LKPL received full capacity and energy charge from 2.1.2001 for 15 years and as such it has received the full capacity payments and has not suffered any financial loss. The Petition was filed in 2009 before the APERC and transferred to this Commission, subsequent to the bifurcation of the State. In light of the subsequent event of completion of PPA and receipt of full capacity charges by LKPL, the claim for capacity charges for additional duration is not tenable.

(v) The issue of non-acceptance of COD on 25.10.2000 by the Respondents is irrelevant today since LKPL has recovered its full capacity charges/ fixed charges for a period of 15 years from 2.1.2001. If any payment of capacity charges for the period from 25.10.2000 is being pressed, the same must be accompanied by a direction to LKPL to refund the payments received by it for the period from 25.10.2015 to 1.1.2016.

(vi) An event subsequent to the filing of the Petition, which has a material bearing on the entitlement/obligation of the Respondents, would need to be considered by this Commission (Judgements of the Hon'ble Supreme Court in KN Aggarwal & anr v Dhanraji Devi & anr (2004) (4) AWC 3709 (SC) and Gaya Prasad v Pradeep Srivastava (2001) 2 SCC 604 was relied upon). In the present case, the PPA expired on 1.1.2016, which is a subsequent event. This proceeds on the basis that the project COD is 2.1.2001.



Reply of LKPL

18. LKPL, in response to the above additional submissions, submitted the following:

(i) While the Respondents unilaterally accepted the COD as 2.1.2001, they have made baseless allegations in regard to the testing and commissioning of the project, as an afterthought. It is an admitted position that there was no request/challenge by the Respondents, in terms of clause 8.2 of Schedule F (test procedures) of the PPA, to the test results, as carried out by LKPL, in respect of each generating unit. In case the Respondents had any grievance at the relevant time, they were required to follow the provisions provided in the said clause. Admittedly, such clauses were never invoked or followed by the Respondents. In the absence of any challenge at the relevant time, the COD of the first unit, the second unit, and the project COD as declared by LKPL were final and binding on the Respondents.

(ii) It is well settled that, if a thing is to be done in a particular manner, as per the provisions of the PPA, the Respondents ought to have followed such procedure and acted in accordance with the same (Section 50 of the Indian Contract Act, 1872). The Respondents cannot, at their whims and fancies, raise such issues unilaterally at a later stage. The procedure, commissioning and declaration of COD of the respective units/projects were duly followed by LKPL, in accordance with the provisions of the PPA, and with the involvement of the independent engineer appointed by the parties in terms of Schedule F of the PPA.

(iii) The Respondents suddenly and unilaterally informed LKPL vide letter dated 5.1.2001 that it shall purchase power from LKPL from 2.1.2001 without requiring LKPL to do anything, which further establishes that the CODs as declared by LKPL were correct. The Respondents have failed to address what changed between the various dates on which COD was declared by LKPL and 2.1.2001. Obviously, the Respondents were avoiding the procurement of power from 2.1.2001 for reasons known to them only and without raising any issue on the commissioning as per the provisions of the PPA.

(iv) As a result of the failure on the part of the Respondents, acting in breach of the provisions of the PPA, LKPL is entitled to the capacity charges for the period from 26.7.2000 to 24.9.2000 and 25.10.2000 till 2.1.2001. LKPL has not been paid the fixed charges despite having successfully declared the CODs, which the Respondents have never challenged. The PPA envisages not only commercial operation and regular supply of electricity from the date of the generating unit, but also stated that the same is not deferred till the COD of the entire project capacity, and the sale of energy units only as infirm power prior to the COD of the first unit. Thus, from the COD of the first generating unit, the capacity charges were payable, and similarly, the COD of the second unit, the capacity charges related to the capacity of both the first and the second unit



were payable, and the COD of the third and final unit, the capacity charges related to the capacity of all the units were payable. Under the PPA, the Respondents were obligated to pay capacity charges to LKPL for each generating unit upon its declaration.

(v) In case there was any such delay as contended by the Respondents, they were not required to accept any electricity from LKPL under the PPA. However, as the Respondents unilaterally declared 2.1.2001 as the project COD and started taking electricity from LKPL, this clearly shows that the delay, if any, was waived by the Respondents. The factum of delay cannot be taken as justification for not accepting the unit COD/project COD and thereafter, unilaterally informing LKPL that the project COD shall be 2.1.2001, as per the convenience of the Respondents, while refusing to pay the capacity charges from the COD of each generating unit and project COD up to 2.1.2001.

(vi) The supply commenced from the COD of the first unit from 26.7.2000, and 15 years need to be considered from 25.10.2000, and therefore, the term of the PPA was till 24.10.2015. Article 6.1 of the PPA provides that the PPA may be renewed on terms and conditions mutually agreed by the parties. Accordingly, the Respondents have continued to purchase electricity from LKPL after 24.10.2015; they were required to pay the tariff, as per the terms and conditions of the PPA. As per APPCC letter dated 22.12.2015, it was informed that APPCC/ AP Discoms had decided on the renewal of the PPA subsisting with LKPL and requested LKPL to operate the plant on the same terms and conditions of the subsisting PPA till the renewal of the PPA or till 31.3.2016, whichever is earlier. It is therefore clear that AP Discoms had availed electricity from LKPL till 31.3.2016, even after the expiry of the 15-year period under the PPA.

(vii) The objection of the Respondents that LKPL is not entitled to claim the dues pertaining to the period prior to the liquidation process is contrary to the provisions of law. LKPL, as a going concern, has been vested with the assets, including the claim of the corporate entity in the present management and is entitled to enforce all the claims of the company, including the monetary claims of LKPL against Respondent Discoms. As electricity was generated and supplied to the Respondents during the period from 25.10.2015 to 1.1.2016, and the same was accepted by the Respondents, there is no liability on the part of LKPL to refund any capacity charges.

Analysis and Decision

19. Based on the submissions of the parties, the following issues emerge for consideration:

Issue No. (A): Whether the claims of LKPL are barred by limitation?



Issue No. (B): *Whether the dispute in the present case is to be adjudicated by this Commission or referred to arbitration?*

Issue No. (C): *Whether the date of the Project COD is to be reckoned as 25.10.2000 (as claimed by LKPL) or 2.1.2001 (as claimed by the Respondent Discoms)? And consequently, the commencement of the PPA duration of 15 years;*

Issue No. (D): *Whether LKPL is entitled to the capacity charges and/or energy charges for the period prior to and after the COD of the units/project? and*

Issue No. (E): *Reliefs to be granted.*

We now proceed to examine the aforesaid issues:

Issue No. (A): Whether the claims of LKPL are barred by limitation?

20. We notice that the Respondent Discoms vide I.A. No. 19/2009 in O.P No. 33/2009, filed before APERC, had contended that the claim of the Petitioner is barred by limitation, as the Petition has been filed beyond the limitation period of three years from the date when such amount became due and payable. It has also been submitted that, as the claims were payable by 11.1.2001, the limitation period of three years expired on 11.1.2004, but LKPL had filed the AA No. 31/2004 only on 27.1.2004. Accordingly, the Respondents contended before APERC that LKPL's claim was barred by limitation. Per contra, LKPL pointed out that in terms of the APTEL judgement dated 13.6.2011 in Appeal Nos. 128 & 129/2011, the claims of LKPL are within the period of limitation.

21. We have examined the submissions. It is noticed from the records that, since the parties failed to settle the disputes, LKPL had filed an application before the Hon'ble Andhra Pradesh High Court for the appointment of an arbitrator, and the Hon'ble Court vide its order dated 18.3.2009, disposed of the Petition, granting liberty to LKPL to approach the APERC for appropriate relief. Accordingly, LKPL filed O.P No. 33/2009 (presently transferred to this Commission) before APERC, seeking the reliefs (b) to (d) in para 1 above. However, APERC vide its order dated 13.6.2011 rejected the Petition, on the ground that the period spent by LKPL in arbitration could not be excluded under



Section 14 (2) of the Limitation Act. In other words, the prayer of LKPL in the said Petition was rejected on the ground that the claims are barred by limitation. On an appeal (A. No. 129/2011) filed by LKPL before APTEL against this order, the APTEL vide its judgement dated 12.7.2012, held that the claims of LKPL were not barred by limitation and also directed the refund of the capacity charges along with interest, in terms of the said findings. The relevant portion of the judgement is extracted below:

“In view of the above discussions, it has to be held in computing the period of limitation for the proceedings commenced before the State Commission the period between 8.9.2003, the date of notice of arbitration and 18.3.2009, the date of disposal of arbitration proceedings by the High Court ought to be excluded. In that event, the claims of Appellant cannot be said to be barred by limitation and they must be construed to have been made before the Commission within time.”

22. Against the said judgement, the Respondents filed Civil Appeal (C.A. No. 6036/2012) before the Hon’ble Supreme Court, and the Hon’ble Court, vide its judgement dated 16.10.2015, upheld the APTEL judgement, on the issue of limitation, in favour of LKPL. The relevant portion of the judgement is extracted below:

*“Having considered submissions of the parties we find no merit in the aforesaid contention advanced on behalf of appellant. The view which we are going to take has been indicated by this Court in several judgments including **M.P. Steel Corporation** (supra). But the point requires no debate in view of clear stipulation in explanation (a) to sub-section (3) of Section 14 of the Limitation Act.*

*.....The same conclusion is inevitable even on other relevant facts. The appellant had notice of the arbitral proceeding and after judgment in **Gujarat Urja** (supra), the appellant also took no steps to get the application under Section 11 listed and disposed of earlier to 18.3.2009. The averments and the materials are not sufficient to establish the claim of the appellant that the proceeding ceased to be bona fide after 13.3.2008. As consequence of aforesaid discussion, the challenge to impugned order in respect of views taken on the issue of limitation in the light of principles of section 14 of the Limitation Act fails.”*

23. As the claims of LKPL were found to be within the period of limitation, in terms of the above decisions, the question of examining the said issue in this order does not arise. Issue No. (A) is disposed of accordingly.

Issue No. (B): Whether the dispute in the present case is to be adjudicated by this Commission or to be referred to arbitration?

24. The Respondents have submitted that the main dispute between the parties is the tariff to be paid to LKPL, after the PPA term has ended and before the COD of the



units, where the COD is contested. Pointing out that the liability for the power injected before the COD is only the energy charge or whether it includes the capacity charges, the Respondents have stated that the dispute concerns the determination of charges payable before the COD of the project and during the period when the PPA was renewed, after its initial term had expired. Referring to the APTEL judgement in MPPMCL v DVC (DVC case), the Respondents have argued that the disputes directly relate to the tariff payable and cannot, therefore, be referred to arbitration. In response, LKPL has contended that the issues in the present petition relate to tariff, i.e., entitlement of LKPL to the capacity charges for the period from 26.7.2000 onwards, and such issues have to be decided by the Commission and cannot be referred to arbitration in terms of APTEL judgement in DVC case.

25. We have examined the rival submissions. Section 79 of the Electricity Act provides as under:

“Section 79. (Functions of Central Commission): ---

(1) The Central Commission shall discharge the following functions, namely: -

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

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

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

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

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

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

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26. The dispute in the present case predates the enactment of the Electricity Act, 2003. However, it is pertinent to mention that the parties have been relegated to this Commission, pursuant to the Hon'ble Supreme Court examining Section 105 of the AP (Reorganization) Act 2014 and holding vide its order dated 4.2.2020 in APEPDCL v GMRVPGL & ors, that the Central Commission is the appropriate authority to hear and



decide the disputes and thereafter, the State Commission transferring the pending petitions, including this petition, to this Commission. Under clauses (a) to (d) of sub-section 1 of Section 79 of the Electricity Act, the Commission is required to regulate the tariff of the generating stations owned or controlled by the Central Government and the tariff of the generating stations which have composite scheme for generation and sale of electricity in more than one State, to regulate the inter-state transmission of electricity and determine the tariff of inter-state transmission system. Under Section 79(1)(f) of the Act, the Commission has the power to adjudicate the disputes involving a generating company or transmission licensee in respect of the matters connected with clauses (a) to (d) of sub-Section (1) of Section 79 of the Act or refer to arbitration. In other words, the Commission's jurisdiction for adjudication of the dispute or to refer to arbitration gets invoked if the dispute involves either a generating company or a transmission licensee and the dispute pertains to the regulation of tariffs. We note that APTEL vide its judgment dated 28.8.2024 in MPMMCL v DVC case, while determining the question as to what constitutes 'tariff' and 'non-tariff' disputes has observed that all matters which have a bearing upon tariff for a generating company would constitute 'tariff disputes', but disputes, which do not impact the tariff either directly or indirectly can be considered as non-tariff related disputes referable to arbitration. The relevant portion of the judgment is extracted below:

'25... To understand this aspect, it is necessary to determine what constitutes tariff and non-tariff disputes. In our considered opinion, all the matters which would have a bearing upon tariff for a generating company would constitute 'tariff disputes' namely disputes related to change in law, delayed completion of projects, invocation of Force Majeure events etc. Such matters impact the tariff for a generating company directly, and, therefore, fall solely within the jurisdiction of the Central Commission under Section 79(1) of the Electricity Act, 2003. However, the disputes related to termination, breach of contract which do not impact the tariff either directly or indirectly, can be considered as non-tariff related disputes referable to arbitration.'

27. The aforesaid judgment has been confirmed by the Hon'ble Supreme Court vide its order dated 23.9.2024 in C.A.No.10480/2024. Admittedly, the dispute in the present

case relates to the non-payment of bills (capacity charges and/or energy charges) by the Respondents, as raised by LKPL for the period 2000-01, and is therefore connected with the 'regulation of tariff' under Section 79(1)(b) of the Act. Since the disputes in the present case relates to the payment of tariff by the Respondents to LKPL, during the period prior to COD of the project and during the period when the PPA was in force/ renewed, the same is a 'tariff' dispute, which is required to be adjudicated by this Commission, in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act and in line with the APTEL judgment in the DVC case. It is noteworthy to mention that the Hon'ble High Court of Delhi in OMP (I) (COMM.) 213/2025 (Renew Wind Energy Pvt Ltd. Vs SECI), while examining the adjudicatory and referral powers of this Commission under Section 79(1)(f) of the Act, has, vide order dated 3.11.2025, observed as under:

"23. The power of CERC, qua the first facet, is discretionary in nature, thereby allowing the Commission to choose whether to adjudicate upon the dispute or to refer it for arbitration.

24. Thus, in a case before the CERC involving generating companies or transmission licensee, where the dispute is connected with matters listed under Section 79(1)(a)-(d), the CERC may choose to itself adjudicate upon the dispute or refer the same for arbitration.

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28. Since the issue of limitation raised by the Respondents had been rejected, as stated in para 23 above, the question of LKPL's claim of capacity charges is only required to be examined, pursuant to the transfer of this Petition (OP No. 22/2009) to this Commission. Accordingly, we proceed to adjudicate the disputes raised by LKPL, in the present case, under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003. Issue No. (B) is disposed of as above.

Issue No. (C): Whether the project COD is to be reckoned as 25.10.2000 (as claimed by LKPL) or 2.1.2001 (as claimed by the Respondent Discoms); And consequently, the commencement of the PPA duration of 15 years;

29. LKPL has submitted that in accordance with the terms and conditions of the PPA, it had implemented the project and the first generating unit was tested during the period



from 22.6.2000 to 26.7.2000, and accordingly, the COD of the first unit was declared on 26.7.2000. Similarly, the COD of the second generating unit was declared on 24.9.2000, after testing. Subsequently, LKPL demonstrated the project's total capacity as per the provisions of the PPA, on 25.10.2000, in the presence of the APTRANSCO and NTPC officials (deputed by APTRANSCO), and the COD of the project was declared on 25.10.2000. Pointing out that it had tested the project units in accordance with the test procedures provided in Schedule F of the PPA, LKPL has stated that the Respondents never disputed the performance of the units of the project, except to note that testing is permitted pending resolution of the PPA and commercial issues. Being entitled to capacity charges from the COD of each generating unit and also for the energy unit generated during the testing of the units, LKPL, under the terms of the PPA, raised bills from 15.9.2000 onwards to 11.1.2001, which were not paid by the Respondents.

30. *Per contra*, the Respondents have submitted that the COD of the project was not accepted as 25.10.2000 by APTRANSCO, as the project was abnormally delayed by 834 days from SCOD, and there was no consensus *ad idem* between the parties on the COD date declared by LKPL. The Respondents have also submitted that, in terms of the observations of APTEL in its judgement dated 12.1.2015 in A. No. 154/2015, the date of taking power from the LKPL project by APTRANSCO as per the GoAP directions, was 2.1.2001, and from this date onwards, LKPL paid the full capacity charges and energy charges for the power delivered by the project. They have also argued that the claim for capacity charges prior to 2.1.2001 is not tenable under Article 5.1 of the PPA. In response, LKPL has contended that it had demonstrated its total capacity, as per the provisions of the PPA on 25.10.2000, and declared the COD of the project on the said date. Pointing out that the only pre-condition was that LKPL must have completed its performance acceptance test in accordance with the test



procedures outlined in Schedule F, LKPL has stated that, in terms of Article 1.1 (13) of the PPA, the Respondents or the GoAP have no role whatsoever, in the declaration of the COD, and is irrespective of the date, the Respondents may choose to draw energy from such units.

31. We have examined the rival submissions. Article 1.1(13) of the PPA provides as under:

“Commercial Operation Date or COD: means, with respect to each Generating Unit, the date on which such Generating Unit is declared by the Company to be operational; provided that the Company shall not declare a Generating Unit to be operational until such Generating Unit has completed its performance acceptance test in accordance with Schedule F (Test Procedures).”

32. Similarly, Article 1.1(48) of the PPA provides as under:

“Project COD: means, the Commercial Operation Date of the last Generating Unit.”

33. Schedule F: Test Procedures are in terms of the following provisions of the PPA:

“Article 8.1: Within five (5) days after the conclusion of any test, the company shall submit a written report to the Board which shall contain:

(i) Sufficient data to demonstrate the level of performance during such test;

(ii) If a Generating Unit has passed the performance acceptance test, the date and time for commencement of Commercial Operation for such Generating Unit for the purposes of this Agreement.

Article 8.2: If the Board disputes any call or all the results contained in the report provided by the Company pursuant to paragraph 8.1 above, then the matter shall be referred to the Independent Engineer.

34. The erstwhile APSEB had invited a bid through international competitive bidding for a short gestation power project, and LKPL's bid for a liquid fuel-based thermal power plant was duly accepted by APSEB. LKPL and APSEB executed a PPA on 31.3.1997, pursuant to which LKPL set up a 368.44-MW combined-cycle power plant. On the reorganisation of APSEB in 1998 and the issuance of the first transfer scheme, the rights and obligations under the PPA were divested to APTRANSCO, and upon the notification of the third transfer scheme, the rights and obligations were further divested to the Respondent AP Discoms. Article 6.1 of the PPA provided that the duration of the PPA was from the effective date (date of execution of the PPA, i.e.,



31.3.1997) and the expiry date is 15 years from the COD of the project. In terms of Article 1.1(13) of the PPA, the commercial operation date or COD, with respect to each generating unit, is the date on which such unit is declared by the company (LKPL) to be operational, provided such unit has completed its performance acceptance test, in accordance with Schedule F test procedures, in terms of articles 8.1 and/or 8.2 of the PPA. The Project COD was defined as the COD of the last generating unit. According to the terms of the PPA, LKPL was required to complete the said project within a period of 16 months from the date of operation of the PPA (20.5.1997), subject to any delay caused due to force majeure events, the purchaser's default and other reasons for which extension was provided in the PPA. One of the primary conditions precedent under the PPA, for the timely execution of the project, was the availability of fuel to support 100% Plant load. The Respondents were required under the PPA to make reasonable efforts to ensure the availability of fuel for 100% PLF. However, LKPL was required to proceed with the Project on being assured fuel linkage for 100% PLF.

35. As regards the COD of the units/project, we notice from the various letters exchanged between the parties that the Respondent, APTRANSCO, had permitted the synchronisation of the units by LKPL, for testing purposes only, pending resolution of the PPA and commercial issues. In fact, vide letter dated 22/24.7.2000, the Respondent APTRANSCO informed LKPL that before allowing the COD of the units/project, a decision on issues, including allowing the Project COD, condoning the delay in SCOD with resolution of commercial issues, was required. However, LKPL vide its letter dated 31.7.2000 informed APTRANSCO regarding the COD of the first unit (on 26.7.2000) after successful completion of the Performance Acceptance Tests (PAT) in the presence of an official of APTRANSCO. Similar letters were sent by LKPL regarding the completion of the PAT and the declaration of COD of the second unit, including the letter dated 30.10.2000, informing the Respondent APTRANSCO of the



completion of the tests on the generating project, and the declaration of Project COD on 25.10.2000. In other words, the project achieved COD on 25.10.2000, and LKPL also raised bills for the Respondents' energy charges. However, the Respondent APTRANSCO vide its letter dated 4.11.2000, refused to accept the Project COD on the ground that it was not achieved as per the provisions of the PPA. Respondent APTRANSCO vide its letter dated 5.1.2001, proposed to purchase power from the Project from 2.1.2001, pending final settlement of the following issues:

- (i) *Delay in the commissioning of the Project by LKPL in terms of the PPA provisions, duly reckoning the date as 21.5.1997 with reference to the date when 80% fuel linkage was allowed to LKPL by Govt of India;*
- (ii) *Treatment of the delay in achieving the COD and consequential levy of liquidated damages;*
- (iii) *Payment for open cycle tariff;*
- (iv) *Validity of contention of APTRANSCO that force majeure clause is not applicable to the event of sinking of turbine in the sea, because of accident occurred subsequent to the Scheduled COD date (calculated with reference to 80% fuel linkage date);*
- (v) *Tariff-renegotiations.*

36. It is evident from the above that the disputes raised by the Respondents with regard to the COD declaration do not pertain to any issues with the PAT results but mainly pertain to the delay in the commissioning of the Project and call upon LKPL to seek the State Government's approval for the PPA and commercial issues. In this regard, it is pertinent to note that the provisions of the PPA do not, in any manner, obligate or mandate LKPL to seek the approval of the State Government on the PPA for the declaration of COD. The only requirement for COD declaration was the successful completion of PAT under Schedule F of the PPA, which LKPL completed in the presence of APTRANSCO officials and published the test results. Also, the PPA does not envisage the non-recognition of the COD by the Respondents or the State Government, except for referring the matter to an Independent Engineer in case of any dispute, which, admittedly, was not done in the present case. Thus, LKPL having

successfully declared the units/Project COD in terms of the provisions of the PPA, after completion of tests, there was no reason for the Respondents to deny/object to the same. In this backdrop, the Respondents' unilateral decision to draw power from the LKPL project with effect from 2.1.2001 (*based on the GoAP directions*), cannot in any manner, be reckoned as the Project COD date, as contended by the Respondents.

37. As stated, the Respondents' objection to the Project COD of 25.10.2000 is mainly attributed to the delay in the commissioning of the Project. We note that the project of LKPL was delayed on two counts, viz., (i) the delay in the allocation of fuel for facilitating the operation of the plant at 100% PLF and (ii) Force Majeure due to the sinking of a barge carrying the turbine and generator of the first unit. As regards the delay in the allocation of linkage fuel, it is noticed that LKPL had claimed that the period of 16 months for the commissioning of the project should be reckoned from the 61st day of acceptance of fuel linkage at 100% PLF, i.e., with effect from 18.1.1999, which was objected to by the Respondents. As regards the force majeure event, LKPL had given a force majeure notice on 5.6.1999, under clause 10.2(a) & (b) of the PPA, and after receipt of the substitute Gas Turbine generator on 20.1.2000, it gave a notice of cessation of the force majeure event on 31.1.2000. However, the Respondents were drawing power from 2.1.2001, without raising objections to the delay in the COD of the Project. However, it is noticed that only on 14.12.2005, the Respondent APPCC raised the issue of delay in commissioning of the project, from the SCOD date and adjusted the amount payable under LKPL invoice dated 12.12.2005, towards its claim for Liquidated Damages (LD) for Rs 95.16 crores for the period from 20.9.1998 to 2.1.2001. It also filed a petition before the State Commission, seeking the recovery of the said LD amount. Against this, LKPL approached the Hon'ble High Court of AP (W.P.No.27101/2005), challenging the imposition of LD and the Ld. Single Judge of the Hon'ble High Court of AP on 29.12.2005, granted an interim stay of the operation



of the Respondent's letter dated 14.12.2005. Against this order, the Respondents filed an appeal before the Division Bench of the Hon'ble High Court, which, on 2.2.2006, stayed the operation of the order dated 29.12.2005, subject to the Respondents not making further deductions in the future bills of LKPL. An SLP filed by LKPL against this order was dismissed by the Hon'ble Supreme Court. However, the Division bench of the Hon'ble High Court on 11.4.2011, disposed of the said writ petition, holding that the State Commission was empowered to adjudicate the disputes. Accordingly, the APERC on 13.6.2011, while dismissing the petition filed by the Respondents (seeking recovery of LD) as being barred by limitation, held on merits that they were entitled to recover the LD. Against this order, LKPL filed a review petition before the State Commission, which was dismissed on 23.4.2013. Aggrieved, LKPL filed Appeal (Appeal No. 154/2013) before APTEL contending that (i) there was a delay of 537 days in getting 100% fuel linkage for the project and thus the SCOD of the project and all other milestones stood postponed by a period of 237 days and (ii) there was a force majeure event of sinking of barrage from 2.6.1999 to 22.1.2000, and this fact was never challenged by any of the Respondents. However, the Respondents, in their replies filed before APTEL, mainly argued that LKPL had not established its case regarding the said force majeure event and that obtaining 100% fuel linkage was not the responsibility of the Respondents. Accordingly, the Respondents contended that since the Project COD was disputed, it had, based on the directions of the GoAP, started taking power from the LKPL project from 2.1.2001, thereby rendering LKPL liable for the levy of LD from 20.9.1998 to 2.1.2001. Allowing the said appeal filed by LKPL, APTEL vide its judgment dated 12.1.2015, observed/held as under:

“63. Summary of our findings

(i) After considering the various rulings of the Hon'ble Supreme Court referred to above and the circumstances of the case we have come to the conclusion that the State Commission having come to the conclusion that the Petition filed by the respondents 2 to 7 was barred by limitation, had no jurisdiction to decide the matter on merits holding



that the respondent no. 2 to 7 are entitled to adjust the balance amount of Rs. 48,06,55,963/- crores towards the liquidated damages.

Xxx

(iii) Article 7.2 (g) provides for extension of scheduled date of completion of the project for the delay reckoned from 61st day in the issuance of fuel linkage at a PLF of 100%. Admittedly, the fuel supplier, namely HPCL confirmed supply of fuel to generate power at 100% PLF only on 17.11.1998. Accordingly, the extension of COD has to be allowed for number of days calculated from 30.5.1997 to 18.1.1999 as per the terms of the PPA.

xxx

(iv) We find that the State Commission has wrongly considered clause 10.1 (ii) (1) while deciding the issue that there was no force majeure. However, force majeure was claimed by the Appellant under clause 10.1 (ii) (6) which has not been considered by the State Commission. We set aside the findings of the State Commission with regard to force majeure for reasons explained under paragraphs 41 to 47.

Xxx

(vi) The amount illegally adjusted by Respondent no. 7 against the power supply bills of the Appellant has to be reimbursed to the Appellant with interest @ 12%."

38. Also, clause 10.1(ii)(6) of the PPA provides for the non-political force majeure events, comprising acts, such as an air crash, shipwreck or train wreck or loss or damage to any major component of the project arising in the course of marine transit, other than due to the fault of the transporting party. LKPL, in its force majeure notice dated 5.6.1999, had informed the Respondents about the sinking of the barge shipping the Gas Turbine and the Generator of the first unit, due to an unexpected storm on 2.6.1999, and after receipt of the substitute Gas Turbine Generator on 20.1.2000, informed that the said force majeure event ceased to exist. Thus, the objections of the Respondents on the Project COD, due to the delay, having been settled by APTEL in favour of LKPL as above, the Respondents cannot raise the same plea to deny/object to the Project COD of 25.10.2000, declared by LKPL in terms of the provisions of the PPA. The factum of the Respondents drawing power from the Project since 2.1.2001 was based only on the GoAP directions, as is evident from its submissions before APTEL (in Appeal 154/2013). This, in our view, is contrary to the provisions of the PPA, as the declaration of COD does not mandate the State Government's approval. Therefore, the drawal of energy by the Respondents from 2.1.2001 cannot be reckoned as the deemed COD of the Project, as prayed for by the Respondents.



Accordingly, we reject the submissions of the Respondents and hold that the date of COD of the first and second units shall be reckoned as 26.7.2000 and 24.9.2000, respectively and that the third unit/ Project COD of LKPL shall be reckoned as 25.10.2000.

Duration of the PPA

39. Article 6.1 of the PPA provides as under:

Article 6.1: *“Term of the Agreement: Subject to the terms of this Agreement, this Agreement shall become effective upon the execution and delivery thereof by the parties and shall continue in force from the date of such delivery until the completion of a period of fifteen (15) years from the Project COD unless earlier terminated as provided herein. And not later than one hundred and eighty (180) days prior to the expiry of the initial term of this Agreement. the Agreement may be renewed for such further period and on such terms and conditions as may be mutually agreed upon between the Parties.”*

40. It is noticed that the PPA dated 31.3.1997, was amended by the parties, on 21.5.1997. In accordance with Article 6.1 above, the 15-year period commences from the Project COD, unless terminated earlier. Since we have, in this order (para 39 above), decided that the Project COD shall be reckoned as 25.10.2000, the period of 15 years under the said Article commences from 25.10.2000 and expires on 24.10.2015. That being so, we proceed to examine some of the arguments of the Respondents that (i) the parties acted on the basis of the Project COD of 2.1.2001 and LKPL, having duly declared availability and accepted payments till 1.1.2016 (15 years), it is not open for LKPL to now contend that the COD ought to be taken as 25.10.2000 (ii) in case the Project COD is 25.10.2000, then the PPA duration would be completed by 24.10.2015 and LKPL would not be in a position to claim the capacity charges up to 1.1.2016 as per the PPA duration and hence LKPL may be directed to refund the payments received by it from 25.10.2015 to 1.1.2016, as it would amount to double payment. Placing reliance on the judgment of the Hon'ble Supreme Court in APTRANSCO v GMR VPL & ors (2018) 3 SCC 716, the Respondents have argued that when the parties have, by their conduct, put a particular interpretation of the



agreement, the same is binding and there is no requirement of any further inquiry as to the actual interpretation; and (iii) subsequent to the completion of PPA tenure on 1.1.2016, LKPL approached the residuary AP Discoms for renewal of PPA and the State Commission in its order dated 8.8.2018 in O.P No. 8/2018, clearly recorded that the PPA with LKPL expired on 1.1.2016.

41. In response, LKPL has pointed out that the Respondents cannot be permitted to raise additional grounds in the present proceedings, which have been transferred from the State Commission. It has, however, submitted that the calculation of 15 years for determining the duration of the Project shall be from 25.10.2000, and the PPA expired on 24.10.2015. LKPL has argued that despite the expiry of the PPA, the parties continued to perform their obligations under it, thereby extending its operation by conduct. In support of this, LKPL has relied on the APPCC letter dated 2.12.2015 requesting LKPL to operate the plant, on the same terms and conditions of the subsisting PPA from 2.1.2016 till the renewal of the PPA or till 31.3.2016, whichever is earlier. Pointing out that the Respondents cannot enjoy the benefits under the PPA by drawing energy throughout the period from 25.10.2000 to 1.1.2016, LKPL has submitted that the payments made from 2.1.2001 till 1.1.2016 were in terms of the PPA and it was also entitled to the capacity charges unpaid by the Respondents for the period from 25.10.2000 to 1.1.2001.

42. We have examined the rival submissions. Though objections have been raised by LKPL with regard to the duration of the PPA raised by the Respondents in the present proceedings, on the ground being a subsequent event, we examine the same, as it has a material bearing on the entitlement/obligation of the Respondents. The contention of the Respondents that the parties have acted on the basis of the Project COD as 2.1.2001 [as in para 40 (i) above], deserves no merit for consideration. As

noted earlier, LKPL declared the units/Project COD on 25.10.2000, after successful completion of tests and in accordance with the provisions of the PPA. Admittedly, the Respondents made no challenge to the tests completed by LKPL for the declaration of COD. Despite this, the Respondents unilaterally, vide letter dated 5.1.2001, decided to draw power from the Project from 2.1.2001, pending finalisation of the issues. However, the said letter, wherein, the Respondents assured LKPL that (i) it would make the payments in respect of the energy charges, from the date of synchronisation of the first unit (22.6.2000) till the date commencement of power purchase and limiting the same to the fuel bills and (ii) it would also make payments of the capacity charges for the period from 25.10.2000 onwards, based on the actual energy delivered, clearly evidences the fact that the Respondents were avoiding the procurement of power from LKPL till 1.1.2001. Thus, the question of both parties acting on the basis of Project COD as 2.1.2001, as contended by the Respondents, is misconceived and therefore, the judgment of the Hon'ble Supreme Court in APTRANSCO v GMRVPL case cannot be applied to the present case. By no stretch of imagination can the Project COD of 25.10.2000 be revised to the date of drawal of power by the Respondents, i.e. 2.1.2001, based on the directions of the State Govt, which was not envisaged under the PPA. This unilateral conduct of the Respondents is further evident from the fact that LKPL, on being denied the payment of capacity charges raised by it vide bills for the period from 15.9.2000 till 11.1.2001, was forced to approach the State Commission, wherein the Respondents took the stand that the claims of LKPL were barred by limitation. This stand of the Respondents was rejected by APTEL and was also upheld by the Hon'ble Supreme Court, as noted earlier, in this order. Subsequently, when the Respondents imposed LD for the period from 20.9.1998 to 2.1.2001 (due to the delay in the commissioning of the Project), LKPL was forced to approach APTEL, wherein the imposition of LD by Respondents was held to be barred



by limitation, and APTEL also favoured LKPL on the aspect of delay in commissioning of the project. Thus, the Respondents, after having failed to espouse their cause successfully, cannot now argue that LKPL's claim for capacity charges for the period prior to 2.1.2001 is not tenable, as it had accepted the Project COD as 2.1.2001 and supplied power till 1.1.2016, for which payments were made by the Respondents.

43. Further, the Respondents' contention [in para 40 (ii) above] that in case the Project COD is 25.10.2000, the PPA duration of 15 years would be completed by 24.10.2015 and therefore, LKPL may be directed to refund the payments received by it from 25.10.2015 to 1.1.2016, is baseless and untenable. Admittedly, LKPL in the present case has claimed payment of capacity charges for the period prior to 2.1.2001 (25.10.2001 till 1.1.2001) since the Respondents had made payments for the energy drawn by it from 2.1.2001 till 1.1.2016. Even though the PPA expired on 24.10.2015, we note that the Respondent APPCC vide its letter dated 22.12.2015, had, in terms of Article 6.1 of the PPA, decided for the renewal of the PPA, as under:

"APPC/ APDISCOMs have decided for renewal of the Power Purchase Agreement subsisting with M/s LANCO in terms of the Article 6.1 of PPA. The terms and conditions and tariff proposed by you for renewal of the project are under evaluation.

In the light of the above, I am directed to inform you that, APDISCOMS have decided to operate the plant on the same terms and conditions of the subsisting PPA till the renewal of the PPA or 31.03.2016 whichever is earlier with mutually agreeable terms and conditions approved by regulatory commission and the difference if any will be trued up after finalization of renewed PPA whose terms will be applied for the interim period from 02.01.2016 till signing of new PPA or till 31.3.2016 whichever is earlier. Since the PPA expires on 01.01.2016, you are requested to schedule entire power to APEDCL and APPDCL (AP DISCOMs) only with effect from 00.00 Hrs of 02.01.2016."

44. The aforesaid letter has not been denied or objected to by the Respondents. It is therefore evident that in terms of Article 6.1 of the PPA, the subsisting PPA dated 31.3.1997 was sought to be renewed by the Respondent Discoms on the same terms and conditions, from 2.1.2016 till the renewal of the PPA or till 31.3.2016, whichever was earlier. Therefore, it is inferred that the supply made by LKPL, after 24.10.2015 till 1.1.2016 to the Respondents, was based on the same terms and conditions of the



PPA, which stood extended, by consent of the parties and conditions approved by the regulatory Commission. In other words, the Respondents chose to purchase power from LKPL beyond the terms of the PPA (24.10.2015) and continued to make payments to LKPL. Even assuming, without admitting that the PPA expired on 1.1.2016, the Respondents' contention that LKPL is liable to refund the capacity charges paid by the Respondents from 24.10.2015 to 1.1.2016 has no legs to stand, as the supply made by LKPL to the Respondents, during the said period, was based on mutually agreeable terms and conditions of the parties. The Respondents, having benefitted from the energy drawn from LKPL during the said period, are bound to compensate LKPL by making payments (which were indeed made) and cannot now seek a refund of the same, contrary to the settled principles of law. Under Section 70 of the Indian Contract Act, 1872, when a person under a contract lawfully does anything for another person, or delivers anything to another person, without an intention to do gratuitous act, then such other person who enjoys the benefit thereof is bound to compensate the former for the work carried out or goods delivered and to restore the party to its original position. The aforesaid principle was reiterated by the Hon'ble Supreme Court in State of West Bengal vs. B.K. Mondal, AIR 1962 SC 779. The aforesaid provision is applicable to the present case, as the obligation carried out by LKPL to supply power during the period from 25.10.2015 to 1.1.2016, was with the mutually agreeable terms of the subsisting PPA between the parties. Therefore, the hypothetical question of LKPL refunding the amounts does not arise, as the power has been supplied on mutually agreed terms. As regards the reliance placed by the Respondents on the State Commission's interim order dated 8.8.2018 in IA No.16/2018 in OP No. 8/2018 [para 40 (iii) above], to contend that the said order clearly records that the PPA had expired on 1.1.2016, lacks merit, as the same is not a finding,



but a mere recording of the Respondents submission in the said order. The submission of the Respondents, on this count, stands rejected.

45. Based on the above discussions, we hold that since the Project COD shall be reckoned as 25.10.2000, and LKPL became entitled to the payment of capacity charges till 2.1.2001. Issue No. (C) is disposed of in terms of the above.

Issue No.(D): Whether LKPL is entitled to the capacity charges and/or energy charges for the period prior to and after the COD of the units/ project?

46. LKPL has submitted that Articles 2.1, 2.2 and 2.3 of the PPA envisage the commercial operation and regular supply of electricity from the date of the generating unit and the same is not deferred till the COD of the entire project capacity, and the sale of energy units is only as infirm power prior to the COD of the first unit. Pointing out that the sale of energy from the first generating unit is a regular supply of power and not infirm power, LKPL has stated that from the COD of the first generating unit (26.7.2000), the capacity charges were payable. Similarly, from the COD of the second unit (24.9.2000), the capacity charges related to the capacity of both the first and the second unit and after the COD of the third unit/Project COD, the capacity charges related to all the units were payable by the Respondents. Accordingly, LKPL has stated that it furnished bill Nos. 3A dated 19.9.2000 for Rs. 3,94,57,811/-, 4A dated 15.9.2000 for Rs. 8,14,91,927/-, 5A dated 12.10.2000 for Rs. 12,15,50,816/- 6A dated 13.11.2000 for Rs. 21,75,89,908/-, 7A dated 11.12.2000 for Rs. 25,81,61,291.15 and 8 dated 11.1.2001 for Rs. 26,62,07,310/- towards capacity charges in accordance with the provisions of the PPA. It has also submitted that the energy charge was claimed for the period from 22.6.2000 to 26.7.2000 (vide bill Nos. 1, 2) and for the period from 26.7.2000 to 10.1.2001 (vide invoices 3B, 4B, 5B, 6B, 7B and 8). Referring to Article 5.1 of the PPA, LKPL has stated that payment of energy charges only, without capacity charges, is relevant with respect to each generating unit prior to its respective COD,



and not after the date of the CODs. LKPL has also submitted that infirm power has been attributed to each generating unit and not to the entire project with all three units. *Per contra*, the Respondents have referred to Article 5.1 of the PPA and submitted that, in terms of this article, only energy charges for all the energy units generated prior to the Project COD of the unit (2.1.2001) shall be payable, and no capacity charges shall be payable for such energy. Accordingly, the Respondents have submitted that only energy charges were paid in respect of the bills raised by LKPL for the period from 27.7.2000 to 10.1.2001, amounting to Rs 76,59,03,327/- (vide bill Nos 3B, 4B, 5B, 6B, 7B and 8) as the Project COD was 2.1.2001.

47. The matter has been examined. Some of the provisions of the PPA are extracted below:

Article 2.1: *“Sale and Purchase of Capacity: From and after the Commercial Operation Date of the first Generating Unit, subject to the provisions of this Agreement, the Company shall sell, and the Board shall purchase, for the consideration of the Capacity Charge, all the available capacity of the Project.”*

Article 2.2: *“Sale and Purchase of Energy: From and after the Commercial Operation Date of the first Generating Unit, subject to the provisions of this Agreement, the Company shall sell, and the Board shall purchase, for the consideration of the Energy Charge, the Net Electrical Energy of the Project.”*

Article 2.3: *“Sale and Purchase of Power before COD of a Generation Unit: The Company shall sell, and the Board shall purchase, all Energy Units generated by any Generating Unit during testing prior to the COD of such Generating Unit, for the consideration of the Energy Charge.”*

Article 3.1: *“Capacity Charge: The Board shall pay for the capacity of the Project in respect of any Tariff Year a Capacity Charge calculated in the manner described in Article 3.2 in respect of the Cumulative Available Energy provided by the Project, up to (but not exceeding) an amount of cumulative Available Energy which is equivalent to a PLF of 80%.”*

Article 5.1: *“Payments for Power Generated prior to the COD of a Generating Unit: The Board shall pay to the Company monthly payment of the Energy Charge only for all Energy Units generated prior to the Commercial Operation Date of such Generating Unit. Each monthly payment shall be made on the fifth working day following the date of submission of a bill by the Company.”*

48. Article 2.1 of the PPA required the Respondents to pay capacity charges from the date of the Commercial Operation of the first unit, i.e. from 26.7.2000. The Commercial Operation Date for the project's first generating unit was declared on



26.7.2000. The commercial operation date for the second generating unit was declared on 24.9.2000. The total capacity of 368.144 MW was demonstrated on 25.10.2000 in the presence of the officials of the Respondent APTRANSCO. Thus, the Project COD was declared on 25.10.2000 (and not 2.1.2001), as decided above. Under Article 3.1 of the PPA, the Respondents are required to pay capacity charges for the capacity of the project in respect of any tariff year, calculated in the manner described in Article 3.2, in respect of the cumulative Available Energy provided by the Project, up to (but not exceeding) an amount of cumulative Available Energy which is equivalent to a PLF of 80%. Article 5.2 (a) of the PPA provides for monthly tariff billing. It stipulates that each bill for the billing month shall be payable by the Respondent Board on the due date. Article 5.2(b) addresses the calculation of the monthly capacity charges for each billing month.

49. It is noticed that LKPL started to generate power immediately after the COD of the first unit and delivered to the grid as well, as recorded by the Hon'ble Supreme Court in APPCC v LKPL (2015) 3 SCC 468. However, the Respondents have submitted that in accordance with Article 2.3 of the PPA, the energy supplied by LKPL prior to 2.1.2001 was treated as infirm power and the corresponding ECR was paid to LKPL. According to us, under Article 2.1, the sale of energy from the first generating unit is a regular supply for consideration of capacity charges and cannot be treated by the Respondents as an infirm power, for the payment of only the energy charges. Anyhow, the Respondents having paid the Energy Charges to LKPL, are also liable to pay the capacity charges to LKPL, in terms of the invoices raised. LKPL has further submitted that, under the provisions of the PPA, the Respondent Discoms were required to pay the capacity charges for the declared availability by LKPL, irrespective of whether the Respondents scheduled or took the quantum of electricity or not. In its reply affidavit dated 14.7.2025, LKPL has submitted that the Respondent is liable to



pay the capacity charges for the generating units/project from respective CODs (26.7.2000) and consequently the Project as a whole from 25.10.2000, along with the late payment surcharge in terms of Article 5.11 of the PPA read with Article 14.2 of the PPAs. As noted in para 46 above, LKPL has raised six invoices (Nos. 3A to 7A and 8) for the period from 26.7.2000 to 10.1.2001, which remain unpaid by the Respondents. It is an admitted fact that the Respondents have neither denied the correctness of these bills nor made any efforts to make payment of the same to LKPL. Thus, in terms of Article 5.2 of the PPA, LKPL is entitled to the recovery of capacity charges from the respective CODs of the generating units. Accordingly, from the COD of the first generating unit on 26.7.2000, the Respondents became liable to pay capacity charges corresponding to the available capacity of the first unit. Upon the COD of the second generating unit on 24.9.2000, the Respondents' liability extended to the payment of capacity charges in respect of the combined capacity of both the first and the second units. Further, with the declaration of COD of the third generating unit and the achievement of the Project COD (25.10.2000), the Respondents became liable to pay capacity charges relating to the entire project capacity comprising all the three units.

50. In view of the above, the legitimate claim of LKPL for capacity charges cannot be denied on any ground, and the Respondents are accordingly held liable to make payment of capacity charges progressively for the capacity of the respective units from their individual CODs, and thereafter for the full project capacity from the Project COD, for the period commencing from 26.7.2000 till 1.1.2001, in accordance with the provisions of the PPA and the invoices raised thereunder. Issue No. (D) is disposed of in the above terms.

Issue No. (E): Reliefs to be granted

51. Article 5.7 of the PPA provides as under:



Article 5.7: "Billing Dispute: Notwithstanding any dispute as to all or any portion of any bill submitted by the Company to the Board, the Board shall pay the full amount of the bill provided that the amount of the bill is based on (a) a meter reading that has either been signed by both Parties or certified by the Company with respect to the Board's refusal to sign within three (3) days of the meter reading date and (b) the provisions of this Agreement. The Board shall notify the Company of any disputed amount, and the Company shall rectify the defect or otherwise notify its rejection of the disputed amount, with reasons within five (5) days of the reference by the Board, failing agreement which the provisions of Article 14 shall apply with respect thereto. If the resolution of any dispute requires the Company to reimburse the Board, the amount to be reimbursed shall bear interest at the Working Capital Rate applicable to the Board from the date of payment by the Board to the date of reimbursement. The Board may not dispute any amount after sixty (60) days following the Due Date of Payment therefor."

52. Similarly, Article 5.11 of the PPA, with regard to late charges, is as under:

Any payment made beyond the Due Date of Payment shall include a late charge in an amount equal to the greater of (a) the product of (i) the amount of such bill and (ii) the Working Capital Rate applicable to the Company then in effect, calculated on the basis of the number of days the payment was overdue, and (b) the amount of any liability incurred by the Company for penal interest on Debt arising out of the Board's failure to make such payment on the Due Date of Payment provided that the Company shall furnish documentary evidence to the Board demonstrating such liability.

53. The term "due date of payment" has been defined as not later than 30 days from the metering date or 25 days from the date of its presentation to the designated officer of the Board. This definition is provided in Article 1.1 (19) of the PPA. Thus, in terms of Article 5.2 (a) read with Article 1.1 (19) of the PPA, the due date for payment of an invoice is 25 days from the date of presentation of the said invoice. Article 5.7 of the PPA provides that the Board may not dispute any amount after 60 days, following the due date of payment. As stated, the Respondents have neither made the requisite payments of the invoices raised by LKPL, nor raised any disputes in respect thereof, consequently being liable for the same. Their only objection is to the Project COD date of 25.10.2000, which has been examined and rejected above. Further, the bills of LKPL are not barred by the period of limitation, in terms of the findings of APTEL and the Hon'ble Supreme Court, as detailed in paras 21 and 22 above. In this background, the present Petition is allowed and it is held that LKPL is entitled to the recovery of capacity charges in terms of the provisions of the PPA, as claimed through the monthly invoices dated 15.9.2000, 19.9.2000, 12.10.2000, 13.11.2000, 11.12.2000 and 11.1.2001,



raised for the period from 26.7.2000 to 10.1.2001. Accordingly, the Respondents became liable to pay capacity charges corresponding to the available capacity of each generating unit progressively from their respective CODs, namely from 26.7.2000 in respect of the first generating unit, from 24.9.2000 in respect of the combined capacity of the first and second generating units, and thereafter for the entire project capacity comprising all the three units upon the declaration of COD of the third generating unit / Project COD, till 1.1.2001. The capacity charges payable by the Respondents shall, however, be duly reconciled by the parties within 15 days from the date of this order, and the Respondents shall make payment of the reconciled amount within one month thereafter.

54. We note that LKPL, in its prayer, has also sought payment of the capacity charges along with Late Payment Surcharge/Interest, in terms of Article 5.11 of the PPA, read with Article 14.2 of the PPA. However, LKPL's claim for interest on the energy charges paid by the Respondents has not been considered in this order, in the absence of proper details with regard to their dates of payment. Liberty is granted to LKPL to claim the same, with proper details, if so advised, and the same will be considered in accordance with the law. Article 5.11 provides for considering late payment charges of an amount equal to the greater of (a) the product of (i) the amount of such bill and (ii) the Working Capital Rate applicable to the Company then in effect, calculated on the basis of the number of days the payment was overdue, and (b) the amount of any liability incurred by the Company for penal interest on debt arising out of the Board's failure to make such payment on the due date. Article 14.2(g) of the PPA provides for considering the interest rate equal to the working capital plus two per cent on receipt of an arbitration award from 30 days after the date of such award is made pursuant to arbitration. However, we find it proper to award interest on the outstanding capacity charges payment (vide invoices 3A to 7A and 8) at the actual rate



of interest paid by LKPL for arranging the working capital funds (supported by the Auditor's Certificate) or the rate of interest on working capital as per the applicable CERC Tariff Regulations or the late payment surcharge rate as per the PPA, whichever is lower. Thus, the Respondents shall be liable for the interest (at the rate specified above) on the outstanding capacity charges (as aforesaid) from the 30th day from the date of the respective invoices (9.2.2001) until the date of this order. The Petitioner and Respondents shall, however, reconcile the amount of interest on the capacity charges within 15 days of this order, and thereafter, make payment of interest, within 30 days thereafter, to LKPL. Needless to say, in case the payments are not made within the timelines as aforesaid, the provisions of LPS shall kick in. Issue No. (E) is decided as above.

55. Accordingly, Petition No. 249/MP/2022 is disposed of in terms of the above discussions and findings.

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