



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500004

O. P. No. 42 of 2015

Dated 09.06.2021

Present

Sri T. Sriranga Rao, Chairman
Sri M. D. Manohar Raju, Member (Technical)
Sri Bandaru Krishnaiah, Member (Finance)

Between:

M/s Penna Cement Industries Limited,
registered office at 705, Road No.3, Banjara Hills,
Hyderabad – 34,

... Petitioner

And

1. APTransco,
Vidyut Soudha, Hyderabad.
2. Andhra Pradesh Power Coordination Committee,
A-Block, Room No.451, Vidyut Soudha,
Khairatabad, Hyderabad – 82
3. Andhra Pradesh Central Power Distribution
Company Limited (APCPDCL), Mint Compound, Hyderabad.
4. Andhra Pradesh Southern Power Distribution Company Limited,
Behind Srinivasa Kalyana Mandapam,
Kesavanayagunta, Tirupathi – 510 501.
5. Andhra Pradesh Northern Power Distribution Company Limited,
H.No.1-1-503 & 504, Opp: NIT Petrol Pump,
Chaitanyapuri, Hanamkonda, Warangal – 506 004.
6. Andhra Pradesh Eastern Power Distribution Company Limited,
P&T Colony, Seethammadhara, Vishakapatnam.

7. TSTransco,
A–Block, Room No.451, Vidyut Soudha,
Khairatabad, Hyderabad – 82,
8. TSPCC, Telangana State Power Coordination Committee,
A–Block, Room No.451, Vidyut Soudha,
Khairatabad, Hyderabad – 82,
9. TSSPDCL, Telangana State Southern Power Distribution
Company Limited, Corporate Office
6-1-50, Mint Compound, Hyderabad – 63. ... Respondents

(Respondents 7, 8 and 9 are added as per notice issued by Joint Director (Law) dated 27.08.2014. Respondent No.3 is not a necessary party as it is no longer in existence after the bifurcation of the State of Andhra Pradesh into the new State of Telangana and the residuary State as State of Andhra Pradesh)

The petition came up for hearing on 05.06.2017 before the earlier Commission and stood adjourned. It is now posted for hearing on 18.01.2021 and 01.03.2021. Sri Deepak Chowdary, Advocate representing Sri Challa Gunaranjan, counsel for the petitioner and Sri Mohammad Bande Ali, Law Attachee of DISCOM alongwith Sri D.N.Sarma, OSD, TSTransco for respondents appeared through video conference on 18.01.2021. Sri Challa Gunaranjan, Counsel for petitioner and Sri D.N.Sarma, OSD (Legal & Commercial) for respondents have appeared through video conference on 01.03.2021. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Penna Cement Industries Limited (petitioner) has filed a petition under section 86 (1) (f) of the Electricity Act, 2003 (Act, 2003) seeking for recovery of Rs. 2,66,34,295/- towards pending dues on account of supply of electricity. The contentions of the petitioner are as hereunder:

- a) The petitioner company is engaged in production of cement and have established two units of 38.5 MW each Power Plant at Ganeshpahad.

- b) The petitioner company had applied for synchronization of one unit of 38.5 MW capacity located at Ganeshpahad village, Damarcharla Mandal, Nalgonda district of then Andhra Pradesh with Transmission Corporation of Andhra Pradesh (APTransco as it then was) grid at 132 kV level proposed to be connected to Wadapally 132 kV sub-station. Since the APTransco approved the request, the petitioner company executed an undertaking on 05.01.2010. On 26.02.2010 one unit of 38.5 MW capacity was synchronized with the grid in presence of officials of the respondents.
- c) Having aggrieved by the non-payment of dues by the respondents to it, this case is filed making 3 (three) claims, which are detailed in the foregoing paragraphs.

Claim No.1:

- d) It has commissioned one of the two units on 26.02.2010 and the 1st unit was established and stabilized by 03.03.2010. The power plant was synchronized with the grid on 26.02.2010. The petitioner company commenced generation of power at 30 MW per day from 05.03.2010, in which period the total units expected to be generated were estimated at 1,94,40,000. It is stated that it addressed a letter on 02.03.2010 to the APTransco intimating them that it requires 39,60,000 units for their cement plants at Talaricheruvu, Boyyireddypalli and Ganeshpahad and therefore it offered to sell the balance power of 1,54,80,000 units to the APTransco. The petitioner also informed that they had synchronized with APTransco at Wadapally substation and that it had installed ABT meter.
- e) It addressed a letter on 03.03.2010 giving proposed schedule of power that will be supplied to the respondents and undertake to furnish the wheeling schedule one day in advance for the next day in the prescribed format and requested the APTransco to award them the purchase order for the power that will be fed into the grid from 05.03.2010 to 31.03.2010 and also gave their consent to supply at the rate of Rs.4.50 per unit.
- f) In anticipation of issuance of the power purchase order under due intimation, it has started supplying firm power by feeding power generated by its plant to the grid from the date of synchronization. Though between 26.02.2010 to 19.03.2010 it had supplied 35,98,658

units, the firm power was supplied only from 05.03.2010 onwards and the total units supplied between 05.03.2010 to 19.03.2010 is 34,53,550 units and as such the respondents are liable to pay for the same at the rate of Rs. 4.50 per unit amounting to Rs. 1,55,40,975/-.

- g) The 2nd respondent addressed letter vide Lr. No. CE/ Comm / APPCC / SE / C2 / DE-BPP-III / F-Penna / D. No. 721 / 10 Dt. 30.03.2010 issuing purchase order only from 20.03.2010 to 31.03.2010 instead of issuing retrospective period that is from 05.03.2010 to 31.03.2010, though the respondents agreed to purchase at the rate of Rs.4.50 per unit. It is stated that it addressed a letter on 30.04.2010, 16.07.2010, 28.12.2010, 03.02.2011, 27.04.2011, 04.07.2011, 19.12.2011, 04.07.2012, to the respondents No.1, and requested to pay for the units received by the respondents from the plant of the petitioner company, however the respondents have not replied to any of these representations and the 2nd respondents addressed a letter Lr. No. CE / Comm / APPCC / SE / C2 / DE-BPP-III / F-Penna / D. No. 84 / 12, dated 02.08.2012 rejecting the requests in one line "Your requests were not considered by the APPCC", mechanically, without application of mind, without any rationale and explanation. It is stated that the denial of liability on the part of the respondents through this letter dated 02.08.2012 is contrary to law and equity, and the petitioner company is entitled to claim for the actual power supplied by then to the respondents. In view of the denial of the respondents, the petitioner company is constrained to seek redressal before the Commission.
- h) Having received power from the petitioner company, which was supplied as sale at the rate of Rs.4.50 per unit, at the request and with the consent of the respondents, the respondents are liable to pay for what they have received for that is for 34,53,550 units, amounting to Rs.1,55,40,975/-, together with interest as prayed for in this application.

Claim No.2:

- i) The 2nd respondent is the branch of the APTransco which determines the purchase of power for the State of Andhra Pradesh.
- j) The 2nd respondents issued tender No.224 /11, Comml / Power buy / Import / 2011-12, Dt. 12.08.2011 inviting bids to purchase additional

power from 01.10.2011 to 31.12.2011 on firm basis. The power generated by it has been offered through trader M/s Reliance Energy Trading Limited (RETL) who had submitted their bid on e-procurement and were successful bidders. The APPCC issued letter vide Lr. No. CE / Comml / APPCC / SE / C2 / DE-BPP-III / F-RETL / D. No. 294 / 11 / Dt. 26.09.2011 to RETL, accepting their bid and placed order for supply of power from 01.10.2011 to 31,10.2011 at the rate of Rs. 4.50 , per unit, which has also incorporated necessary clauses including force majeure. As per the tender terms RETL, was entitled to source power from various sources for supplying the same to the APTransco.

- k) In the acceptance of bid letter dated 26.09.2011, the clause relating to compensation specifies that a sum of Rs.1.00/kWh compensation to be paid by the trader for the shortfall units if he fails to supply 70% of the quantum of power for which corridor is approved. It is stated that in the acceptance of bid letter dated 26.09.2011 referred to above, the clauses of force majeure include amongst other factors enemy acts of any domestics riot or civil commotion etc., and as such any disruption of factors affected due to separatists movement of Telangana is covered under this clause, which was beyond the control of any of the parties hereto.
- l) The 2nd respondent extended the period of supply of power by RETL till 31.12.2011 vide Lr. No. CE / Comml. / APPCC / SE / C2 / DE-BPP-III / F- RETL / D.No. 384, Dt. 11.11,2011. Thus, the respondents firmed up continuous supply of power from RETL from 01.10.2011 to 31.12.2011.
- m) RETL had in turn contracted various power generating companies and accordingly RETL approached the petitioner company seeking supply of power during this period between 01.10.2011 to 31.12.2011 and the petitioner company accepted to supply, which contains similar terms as that of the order placed by APPCC on RETL including force majeure clause.
- n) By the third week of September, 2011, the agitation for separate Telangana was at peak, adversely affecting output of Singareni Collieries, which is to the knowledge of one and all, particularly the

respondents, who suffered the most and the shortage of coal resulted in shutting down of NTPC unit.

- o) It being one of the suppliers of power through RETL also known to the respondents, have addressed a letter on 23.09.2011 to the APTransco vide reference No. PCIL / APPCC / 11-12 / 03 marking a copy to RETL and informed the respondents about the depleted stock of coal due to the existing situation in Singareni Collieries, thereby sufficiently cautioned the respondents about the possible short supply of power with reference to the tenders dated 12.08.2011 invited by the APPCC.
- p) RETL immediately addressed a letter to APPCC informing them about the short supply of coal and referring to the discussions it had with JMD (Comm. IPC & IT), APTransco on 22.09.2011, during which meeting it had informed about the coal shortage and possible disruption of supply, which is well covered under the force majeure clause. Copy of this letter is also marked to the petitioner company and a second letter dated 27.09.2011 was also addressed in this regard by RETL.
- q) RETL have been requesting the respondents not to impose any penalty for shortfall of power supply below 70% PLF since the same has resulted due to shortage of coal supply, which was beyond the control of it. It is stated that it made efforts to use imported coal from their regular supplier M/s Maheshwari Brothers, who, through their letter dated 19.10.2011 expressed their inability to supply due to Telangana agitation.
- r) Due to extreme shortage of coal it was forced to stop one unit and export only 30 MW with their existing coal stock from 17.10.2011, which fact was also brought to the JMD / Comml. IPC&IT, APTransco and Chief Engineer / Comml. APPCC vide letter dated 17.10.2011 requesting them not to levy penalty for failure to supply 70% PLF as per the purchase order and the same was also intimated to RETL. The RETL further represented a letter dated 26.10.2011 informing the difficulties being faced due to short supply of coal along with letter received from the petitioner dated 24.10.2011.
- s) The APPCC issued letter vide Lr. No. Dy. CCA (PP&S) SAO (PP&S) / D. No. 970 / 11 dated 16.11.2011 addressed to RETL, intimating deduction of compensation amount to the tune of Rs. 26,19,411/-

payable by the petitioner towards short supply of power, without taking into consideration the factors of force majeure resulted on account of Telangana agitation. The APPCC further addressed another letter vide Lr. No. Dy. CCA (PP&S) SAO (PP&S) / D. No. 1014 / 11 dated 03.12.2011 deducting the sum of Rs. 14,10,181/- towards open access amount for the period from 01.10.2011 to 31.10.2011. It is stated that the action of the APPCC in imposing these penalties and deducting the total amount of Rs. 40,29,592/- is illegal, arbitrary, contrary to the terms of the contract, amounting to breach of the contract, inequitable, unilateral and ultra vires their powers. It further stated that the unilateral and illegal action of the respondents has resulted in severe financial constrain and losses to it. It is stated that it is entitled for recover Rs. 40,29,592/- from the respondents as the short supply was not intentional or deliberate but only due to short supply of coal, well covered under factors of force majeure. As a matter of fact the respondents themselves have also suffered such losses due to short supply of coal on account of Telangana agitation adversely affecting Singareni Collieries output. They ought to have been responsible in not deducting these amounts.

- t) The petitioner and RETL addressed various representations including letters dated 08.12.2011, 09.12.2011 and 04.07.2012. It is stated that the APPCC addressed a letter Lr. No. CE / Comm / APPCC / SE / C2 / DE- BPP-III / F-Penna / D. No. 84 / 12 dated 02.08.2012 rejecting the requests in one line "Your requests were not considered by the APPCC", mechanically, without application of mind, without any rationale and explanation submitted by the petitioner, refusing to refund the deducted amounts, which resulted in gross miscarriage of justice and the petitioner is left with no option but to seek redressal before the Commission.
- u) It is therefore stated that it is entitled to claim the sum of Rs. 40,29,592/- from the respondents, and the respondents are liable to pay the same.

Claim No.3:

- v) The APPCC placed the following orders with it for purchase of RTC power at the rate of Rs. 4.28 per unit.
- i) vide their letter Lr. No. CE / Comm / APPCC / SE / C2 / DE-BPP-III / F-Penna / D. No.1062 / 10. Dated 26.08.2010 for purchase

of power between 10.09.2010 to 30.06.2011 at 60 MW. The compensation and other relevant clauses have been extracted in the petition.

- ii) Modified the above order vide their letter Lr. No. CE / Comm / APPCC / SE / C2 / DE–BPP–III / F–Penna / D. No. 1381 / 10-11 dated 07.03.2011 for purchase of power between 01.03.2011 to 30.06.2011 for 30 MW. The order reads “the energy sold to APPCC for 30 MW will be settled on 1st charge basis and energy sold through open access for 30 MW is on 2nd charge basis”.
- w) The APPCC deducted the sum of Rs. 58,76,388/- towards the alleged failure of the petitioner company in submitting schedule for 2 days that is 30.04.2011 and 02.05.2011 and consequently deducted the sum of Rs. 11,87,340/- towards penalty for such short supply the total amounting to Rs. 70,63,728/- for the billing month of May, 2011.
- x) It had specifically informed the day ahead schedules during the contracted period without any gap and the allegation made by APPCC that for the supply on 30.04.2011 and 02.05.2011, day ahead schedules were not given is false to the knowledge of the petitioner, as such the respondents are not entitled to make any deductions on the alleged failure.
- y) It has supplied the contracted units of power to the APTransco during the contracted period, constantly at the rate of 30 MW and the same has been recorded in MRI data of ABT billing meter which is an admitted record. It is stated that it has furnished the schedule a day ahead for each day of supply and accordingly has also furnished on these two days that is 30.04.2011 and 02.05.2011 which are self-explanatory. It is further stated that the allegation made by APPCC to justify deductions is false to their knowledge. It is submitted that APPCC has not passed any formal proceedings nor communicated the same to the petitioner company raising demand for liquidated damages, but merely deducted the amount being in a dominant position by withholding funds of the petitioner.
- z) On realizing that APPCC deducted the above mentioned amounts of Rs. 70,63,728/- the petitioner company addressed a letter on 07.06.2011

and demanded them that deduction of units for 30.04.2011 and 02.05.2011 on the alleged non-receipt of schedule by LDC is incorrect and that the schedules were given. The petitioner also reiterated that they have given first priority to supply of power to the APPCC and it is a direct injection and balance is to RETL. So, the first 30 MW is automatically accounted to APPCC and accordingly supplied power on 30.04.2011 and 02.05.2011 as well, which can be verified from the MRI data ABT billing meter.

- aa) The petitioner company had addressed a letter dated 31.08.2011 and demanded APPCC to furnish them the workings for the deductions made against the concerned invoices. The APPCC by letter No. Dy. CCA (PP&S) / SAO-I (PP&S) / AO / JAO / D. No 721 / 2011 dated 09.09.2011 replied it which has been extracted in the petition (*With reference to above it is inform that the statements showing the units admitted and penalty levied for the power purchased for the period from April, 2011 to June, 2011 are in the sheet enclosed as requested.*)
- bb) As per the sheet the total amount shown to have been deducted as Rs. 11.87,340/- as compensation for shortfall, however, APPCC did not give any details for deducting units amounting to Rs. 58,76,388/-, as such APPCC withheld and deducted the sum of Rs. 58,76,388/-, which amounts criminal misappropriation of funds resulting in unjust enrichment to APPCC.
- cc) The compensation clause in the purchase order dated 26.08.2010 does not give APPCC powers, to deduct the units, even if the day ahead schedule is not furnished. The order merely specifies that on the failure of generator to supply 80% of monthly energy, then only penalty at the rate of Rs.1.00/kWh could be imposed. Admittedly it is not the case of APPCC that the petitioner company failed to supply 80% of the contracted quantum, as such APPCC is not entitled to deduct the units supplied on 30.04.2011 and 02.05.2011 and consequently their action in deducting the sum of Rs. 70,63,728/- is illegal, contrary to the terms of the contract and the respondents are liable to refund the same together with interest to the petitioner.

- dd) Admittedly the purchase order dated 26.08.2010 does not state that “*on the failure of the generator to furnish day ahead schedules, the units supplied during these days shall be deducted for which APPCC does not pay*”. As such the deduction is manifestly illegal, arbitrary, without any manner of contractual or legal right in APPCC.
- ee) Admittedly it was supplying power constantly at 30 MW before 30.04.2011 and after 02.05.2011 and also supplied power on 30.04.2011 and on 02.05.2011, thus having received the power from it, the respondents are duty bound to pay to the petitioner.
- ff) It is seeking refund of money arbitrarily deducted by the APPCC. The petitioner stated that several representations on 07.06.2011, 02.07.2011, 29.07.2011, 11.08.2011, 25.08.2011, 17.10.2011, 02.11.2011, 26.11.2011, 19.12.2011, 04.07.2012. It is stated that the Chief Engineer, SLDC, APTransco appears to have addressed letters to generators on or around 07.07.2011 intimating that “*In the event of non-receipt of day ahead schedule by 12:30 hrs, it will be assumed that power availability for supply from your plant to APPCC is “NIL” and the same will be intimated to CE / Comml / APPCC.*” One such letter addressed to M/s Sriba Industries Limited vide Lr. No. CE / SLDC / SEPP / DE-1 / F. Sch / D. No. 173 / 2011 dated 07.07.2011 is filed with the petition. It is stated that all such modification of terms and conditions of supply including the right of APPCC and APTransco through letters issued subsequent to purchase orders, can at best prospective subject to consent of the generator and cannot be retrospective. Admittedly the deductions in question are in respect of 30.04.2011 and 02.05.2011 as such the post order changes do not bind the petitioner company and the deductions are illegal, particularly when the power was admittedly supplied at the scheduled rate.
- gg) The action of the respondents in deducting the total sum of Rs. 70,63,728/- is illegal, contrary to terms of the contract, arbitrary and inappropriate as submitted above and hence it is entitled to recover the same from the respondents.

- 2) The petitioner has sought the following reliefs in the petition.
- a) Direct the respondents to pay the sum of Rs. 1,55,40,975/- together with pendente lite and post award as per the guidelines of Commission, to the petitioner, towards non-payment of power supplied to the grid prior to receipt of purchase order during inception of the power plant during February, 2010 to March, 2010 during which 35,98,658 units were supplied by the petitioner to the respondents.
 - b) Direct the respondents to pay the sum of Rs. 26,19,411/- towards deduction of shortfall and the sum of Rs. 14,10,181/- towards the transmission and SLDC charges deducted during the same period, total amounting to Rs. 40,29,592/- together with pendente lite and post award as per the guidelines of Commission to the petitioner.
 - c) Direct the respondents to pay the sum of Rs. 70,63,728/- towards amounts for units deducted and penalty imposed for short supply, together with pendente lite and post award as per the guidelines of Commission, to the petitioner.
- 3) The respondents through the APCPDCL have filed a counter affidavit in the matter and stated therein as below:
- a) At the outset there are 3 claims made in this petition viz., (a) for payment to the reported supply of power without an order or agreement for the period from 05.03.2010 to 19.03.2010, (b) unjustified levying compensation for the power supply in October, 2011 (c) for payment to supply of power without giving day ahead schedules for 2 days that is 30.04.2011 and 02.05.2011. As such the composite claim for which causes of action arose at different periods and arising out of different contracts indisputably with the petitioner for 3rd claim and with RETL for 2nd claim is not permissible in law. Therefore, the petition is bad for misjoinder of causes of action and non-joinder of necessary parties. Consequently, it has caused prejudice to the respondents in contesting the composite claim consisting of three separate claims.
 - i) Further as far as first claim is concerned that is recovery of money for the energy claims to have supplied during the period 05.03.2010 to 19.03.2010, without any agreement/order, and

without privity of contract with the petitioner by the respondents. Therefore, the petition is not maintainable.

- ii) In respect of 2nd claim which is towards the claim of recovery of money which is withheld and recovered by the respondents on the ground of levying compensation during the period from 01.10.2011 to 31.10.2011.
- iii) In fact, the agreement during the said period was with RETL, a trader. There is no privity of contract between the petitioner and respondents for this claim. That apart the disputes between a trader and DISCOMs (Licensees) has to be decided by Civil Court since such disputes are not covered by Section 86 (1) (f) of Act, 2003 or Section 11 of AP Reforms Act, 1998. Therefore, the Commission has no jurisdiction to entertain such claim.

In reply to Claim No.1:

- b) APPCC/APDISCOMs have been purchasing power from some of the generators in State by placing short term purchase orders, to meet their day-to-day demand. The petitioner has set up a coal based power plant of 2 x 38.5 MW capacity at Ganeshpahad (V) at Nalgonda District, during the year 2010.
- c) In the letter dated 02.03.2010 addressed to CMD / APTransco, the petitioner company expressed their intention to pump their power to the extent of 19440000 units to APTransco, out of which 3960000 units will be utilized to their cement plants at Talaricheruvu and Boyareddy Pally works, both in Ananthapur Dist, as their Ganeshpahad unit is receiving supply from APGPCL and requested to approve open access agreement.
- d) Further in the said letter dated 03.03.2010 they have submitted the date wise schedule to Talaricheruvu and Boyareddy Pally, and APTransco for the period from 05.03.2010 to 31.03.2010. Wheeling schedule will be furnished one day in advance for the next day and requested to award them a purchase order for the power that will be fed into the grid from 05.03.2010 to 31.03.2010. Further it is stated that they are agreeable to the rate of Rs. 4.50/unit.

- e) During further course of time in the letter dated 05.03.2010 the petitioner submitted the revised power schedule to supply of power to their Talaricheruvu unit, Boyareddy Pally unit, and APTransco for the period from 10.03.2010 to 31.03.2010 superseding the previous schedule. Further vide letter dated 08.03.2010 submitted revised schedules for supplying the power generated to their four units as given below.
- a. Penna, TC – ATP 230 – 18 MWs (4 days in a month)
 - b. Penna, BYP – ATP 308 – 22 MWs (4 days in a month)
 - c. Penna, Ganeshpahad – NLG – 406 – 10 MWs (4 days in month)
 - d. Anrak Aluminium Ltd., - VSP – 724 – daily 1 MW.
- Also, petitioner submitted that after availing the above power, they intend to supply the balance power to the Grid.
- f) The CE / Rural Zone / TL&SS / Erragadda, in their letter dated 18.03.2010, informed to CE/Grid duly enclosing the undertaking submitted by petitioner, stating that 38.5 MW capacity generator-2 of Penna Power Plant is synchronized to the Grid at 15.55 hours on 26.02.2010 at 132 kV level, located at Ganeshpahad Village, Damacherla Mandal, Nalgonda District which is connected to 132 kV Wadapalli. In the under taking submitted by petitioner, the following is submitted:
- i. We will pay the open access charges (Trans and SLDC operating charges) and any other applicable charges as fixed by APERC from time to time as per the bills raised by APTRANSCO.*
 - ii) We do not envisage any surplus power export to grid and as such we are not entering into any PPA with DISCOMs/APPCC.*
 - iii) We hereby agree that any infirm power pumped into grid by our power plant at any point of time (during synchronization of power plant and during trial run test period) shall be free of cost and we shall not lodge any claim toward the same.*
 - iv) Whereas we hereby indemnify the APTRANSCO against the loss incurred on account of any mal operation/defaults of our power plant which shall be reimbursed to APTRANSCO without raising any dispute.”*
- g) In the letter dated 15.03.2010 to CE/Grid with a copy to CE / Comml./ APPCC, the petitioner has submitted that the revised schedule to supply

of power to Thallarcheruvu and Boyareddy Palli units and APTransco for the period from 17.03.2010 and 31.03.2010 duly submitting the OA application. Also requested CE / Comml. / APPCC to award purchase order. In the letter dated 15.03.2010 to CE / Comml. / APPCC, petitioner requested to award the purchase order at the rate of Rs.4.50 per unit for the power supplied to APTransco. All the said correspondence was made by the petitioner on their volition without any requirement of power by the respondents.

- h) Though on 02.03.2010 they filed an open access application with CE / GO the schedules were changed again and again for supplying power to their four units and final application is given only on 15.03.2010. As the schedule enclosed to the open access application is changed again and again by the petitioner, CE/GO could not give open access for the penna power plant to wheel their power to cement plants (Talaricheruvu and Boyareddy Pally). Finally, the open access approved by the APTransco for the period from 20.03.2010 to 30.03.2010 was communicated on 19.03.2010 and open access agreement was signed on 19.03.2010.
- i) For the first time on 19.03.2010, as per the directions of CMD / APTransco and DIRECTOR / GO, the developer pumped energy into the AP Grid since 00:00 hrs of 20.03.2010. As such an order for purchase of balance power out of 30 MW proposed to be supplied by Penna Power Plant duly deducting the open access approved quantity is placed on 30.03.2010 with effect from 20.03.2010 to 31.03.2010 that is

20.03.2010	26.03.2010	RTC	7 MW	@
27.03.2010	30.03.2010	RTC	12 MW	Rs.4.50/kWh
31.03.2010	31.03.2010	RTC	30 MW	

- j) The petitioner claims to have pumped the power into APTransco grid, without any Lol i.e., from 05.03.2010 to 19.03.2010, which is treated as inadvertent as there is no existing privity of contract with the petitioner. The company reported to have pumped energy on its own during synchronization process and upto 19.03.2010. In that connection the petitioner in its letter dated 28.09.2010 requested for payment of energy to an extent of 46,25,569 units reported to have exported to grid after

synchronization but during the period when there is no purchase order. Since there is no order or agreement upto 19.03.2010 the respondents had no obligations to pay the price of said infirm power, and thus denied the said request. Therefore, this claim is liable to be rejected.

In Reply to Claim No.2:

- k) They entered an agreement with RETL trader for supply of power during the period from 01.10.2011 to 31.10.2011 at first instance. However, a separate order issued for the period of November 2011 to December 2011 also. The dispute is in respect of compensation levied in the month of October 2011. The petitioner claims that due to Telangana agitation there was short supply of coal, thereby they could not generate power and thus could not supply minimum quantum of 70% of contracted quantum. The respondents submits that as per the Lol dated 26.09.2011 there are certain conditions which are permissible as force majeure conditions so as to relieve the contracting party from supplying the minimum quantum. Telangana agitation has been there in high pitch from December, 2009 onwards. Telangana agitation has been there in high pitch from December 2009 onwards. Therefore, the said agitation aspect cannot be considered as a circumstance which could not be visualized at the time of entering agreement (Lol). Further to submit that such eventualities have not been specified in the force majeure condition. Therefore, firstly since there is no privity of contract with the petitioner the claim is liable to rejected. Secondly since Telangana agitation factor was not considered as force majeure condition in the Lol, and that as the said agitation had been there since December 2009 onwards in high pitch, the same cannot be considered as force majeure to relive the obligation by the supplier. Hence deserves to be rejected.

In reply of Claim No.3:

- l) The dispute is with regard to the power supplied by the petitioner without submitting day ahead schedules on 2 days that is 30.04.2011 and 02.05.2011. As per the regulation in force that is Regulation No.2 of 2006, the power of open access generator shall be calculated as per clause 9 and 10 said regulations. The open access generator is obliged under law to submit day ahead schedule to SLDC and SLDC shall act

upon the same. In this case admittedly open access generator the petitioner did not submit day ahead schedule on 30.04.2011 and 02.05.2011. Therefore, the power reported to have injected without submitting day ahead schedule, to the grid cannot be accounted by the SLDC. As such the said claim is liable to be rejected since the same is contrary to the regulation which is mandatory in nature.

- 4) The Commission heard counsel for the petitioner and the representative of the respondent. It also examined the material available on record. The issue that arises for consideration is whether the petition is maintainable before this Commission. In this regard the submission of the parties at the time of hearing are as extracted below:

Record of proceedings for 18.01.2021

“...The advocate representing the counsel for the petitioner stated that the matter is before the APTEL and hence, the matter cannot be proceeded with. On the other hand, the representative of the DISCOM stated that in the judgment on jurisdiction, the Hon’ble High Court held that CERC has jurisdiction and the petitioner has to make an application to transfer the case to CERC. In view of the ambiguity in the matter, the advocate stated that he will ascertain the factual position and if necessary file a proper memo in that regard. According he sought adjournment of the matter. The matter is adjourned. The petitioner/counsel shall file a detailed memo/statement on or before the date of hearing by giving the factual position in the matter as regards proceeding with the hearing.....”

Record of proceeding for 01.03.2021

“....The counsel for petitioner stated that the matter involves four distribution companies and it was filed in the combined APERC and the matter involves jurisdiction also and as such the matter has to be transferred to CERC. This is in view of the judgment of the Hon’ble Supreme Court in the matter of jurisdiction. The Commission may transfer this file to CERC. The representative of the respondents is in agreement with the submissions of the counsel for petitioner. Accordingly, the Commission will make necessary orders.”

- 5) Before adverting to the issue, the relevant legislative changes and order having a bearing on the issue are noticed herein below. The matter arose under sec 86 (1) (f)

of the Act, 2003. The present petition is filed claiming relief against 4 distribution companies as they were existing at that time of united State of Andhra Pradesh.

6) The A.P. Reorganisation Act, 2014 has created new State of Telangana and residuary State of Andhra Pradesh. Consequently, the DISCOMs are bifurcated geographically and claims relating combined State cannot be adjudicated by any one State. Therefore, the issue of jurisdiction arose in such matters where claims were in respect of two States. This Commission as well as the present Andhra Pradesh Electricity Regulatory Commission have decided the issue separately.

7) The issue of jurisdiction has been decided by this Commission order dated 31.10.2016 in O. P. No. 25 of 2015 and batch.

“82. To sum up, the findings of this Commission are summarised as under:

(i) Three transfer schemes notified under section 23 and 24 of the Reform Act, 1998 are binding on the four Discoms located in the erstwhile Andhra Pradesh and the generators who entered into the Power Purchase Agreements. The third transfer scheme notified u/s 23 stipulates the rights, obligations, agreements and contracts relating to the procurement and bulk supply of electricity or trading of electricity to which the erstwhile APSEB or APTRANSCO was originally a party were transferred and vested in the four DISCOMS respectively in specified ratios as per the Reform Act and Electricity Act, 2003 dated 9.06.2005, G.O.Ms.No.58 and amendments made thereto from time to time are still in force. In the third transfer scheme, the generating capacities allocated to the TSSPDCL and TSNPDCL is 60.28% and this has been amended to 53.89% vide G.O.Ms.No.20 dated 08.05.2014 on account of transfer of Kurnool and Anantapur districts to Southern Power Distribution Company of Andhra Pradesh Ltd. The rights, obligations, claims, compensations or any other claim in respect of power supply of any generator shall be in accordance with the ratio specified in the third transfer scheme or any amendment thereto from time to time. Similarly, the claims, compensation, rights, obligations, etc., by two Discoms located in Telangana state shall also be restricted to the purchase of power made by them in accordance with the ratio specified in the third

transfer scheme or any amendment thereto from time to time. The PPAs have devolved on each Discom individually and not jointly.

(ii) The Central Electricity Regulatory Commission (CERC) does not have jurisdiction over the 34 petitions which were pending before the erstwhile APERC and the Joint regulatory commission on 01.08.2014. In 34 petitions, the supply of electricity was intra-state and at the relevant time to which the petitions relate to and there were no inter-state transactions to invoke the jurisdiction of CERC.

(iii) Generally, under Section 86 of the EA, 2003 the jurisdiction of a state Commission is coterminous with the jurisdiction of the state. Thus, the TSERC shall have the jurisdiction to regulate the purchases of TSSPDCL and TSNPDCL located in the state of Telangana and it shall also adjudicate the disputes involving the two Discoms of Telangana State.

(iv) Under section 105 of the A.P. Reorganisation Act, 2014, the jurisdiction over the pending 34 petitions relating to TSSPDCL, TSNPDCL and any other entity located in the State of Telangana shall vest with the TSERC. In the view of this Commission, sub-section (3) of Section 105 resolves the issue. Sub-section 3 of Section 105, stipulates that the authority before whom the proceedings would have laid if it had been instituted after the appointed day, i.e., 02.06.2014/01.08.2014. All appeals involving the two Discoms of the Telangana State shall be filed before this Commission for adjudication after 01.08.2014. Therefore, the pending 34 petitions involving the two Discoms of the Telangana State shall vest with this Commission for adjudication. After bifurcation of the state, i.e., 02.06.2014 all the disputes u/s 86(1)(f) of the EA, 2003 have to be adjudicated by this Commission and similarly, any petition relating to the two Discoms in respect of disputes prior to 02.06.2014 shall also vest within the jurisdiction of TSERC. The word 'exclusively' used in Section 105 must be given a practical construction and if the actual meaning of the word 'exclusively' is taken as 'substantially' or 'for a greater part' or 'principally' as given in the decision of the Supreme Court in Bihar Fodder scam case, the jurisdiction over 34 petitions shall lie with the TSERC as 32 petitions emanate from the PPAs and the power

sharing ratio of TSDISCOMS according to the third transfer scheme is a greater part, i.e., 60.28% but we do not wish to encroach upon the jurisdiction of another Commission and restrict the adjudication functions of this Commission to the two Discoms, TSTRANSCO and TSPCC in accordance with the provisions of the Reform Act and the Electricity Act to the extent of ratio specified in the third transfer scheme.

(v) The provisions of CPC are not applicable to the interpretation of Section 105 of the A.P. Reorganisation Act. Further, the provisions of Sections 10 & 11 of CPC are also not applicable as the authorities and the parties involved therein are not the same parties.

(vi) TSERC shall have jurisdiction over the petitions involving TSSPDCL, TSNPDCL, TSPCC, TSTRANSCO which are located in the territorial jurisdiction of Telangana state which is coterminous with the jurisdiction of this Commission and this Commission shall adjudicate rights, liabilities and obligations in accordance with the third transfer scheme dated 07.06.2005 notified under section 23 & 24 of the Reform Act, 1998 and under section 131 of the EA, 2003. To repeat, this Commission shall adjudicate on the rights and liabilities to the extent of ratio notified in the third transfer scheme dated 07.06.2005 and amendments made thereto from time to time relating to the entities located in the State of Telangana.

(vii) 32 petitions which emanate from the power purchase agreements, the petitioners are at liberty to revise their cause title and claims/liabilities/obligations/compensation or any other matter in the petitions in terms of third transfer scheme dated 07.06.2005 and the amendments made thereto from time to time confining their rights and liabilities to two Discoms of Telangana State, TSTRANSCO and TSPCC in accordance with the ratio specified in the transfer scheme notified under section 23 & 24 of the Reform Act, 1998 and under section 131 of the EA, 2003 within 45 days from the date of placing of this order on the website of this Commission, i.e., TSERC. This Commission shall adjudicate only the revised petitions which are going to be filed in accordance with the third transfer scheme notified under section 23 & 24 of the Reform Act, 1998 and under section 131 of the EA, 2003.

(viii) *In two review petitions, cause title have to be revised restricting the petitions to the TSDISCOMS, TSTRANSCO and TSPCC.*

(ix) *This order shall be subject to the orders or directions that may be issued by the Hon'ble High Court of Andhra Pradesh and Telangana in the pending writ petitions including GMR Vemagiri and Bharath Aluminium Company Ltd.*

... ..”

8) It came to be challenged before the Hon'ble High Court Hyderabad as it then was in W. P. No 15848 of 2015 and batch which had held that the Central Electricity Regulatory Commission (CERC) is the appropriate forum having jurisdiction to decide the disputes involving the four distribution companies. The Hon'ble High Court has held as below.

“76. *Therefore, in fine, the writ petitions are disposed of to the following effect:*

(i) W.P.Nos.19894 and 15848 of 2015 challenging the orders of CERC, dated 27.04.2015 are dismissed and the CERC is held entitled to decide the disputes covered by the said order, on merits after giving opportunities to all the parties.

(ii) W.P.No.22850 of 2016 challenging the order of the Central Electricity Regulatory Commission dated 15.06.2016 is also dismissed and the CERC is allowed to proceed further with the hearing of the case on merits.

(iii) W.P.Nos.38140, 38137, 38163, 38169, 35386, 35039, 35401 and 25761 of 2017 challenging the order of the APERC dated 28.09.2016 are allowed and the order of the APERC dated 28.09.2016 is set aside. It is declared that the disputes in relation to which APERC passed the order dated 28.09.2016 fall within the exclusive jurisdiction of the CERC and hence APERC shall transfer all such petitions, if not already done, to CERC. One portion of the prayer made in W.P.No.25761 of 2017 by the two distribution companies now located in the State of Telangana seeking to transfer the cases from APERC to TSERC is also dismissed, since that these disputes should be adjudicated by the CERC.

(iv) W.P.No.14033 of 2017 seeking a declaration that APERC alone has jurisdiction to adjudicate their claim in O.P.(SR) No.31 of 2016 and

also seeking to set aside the order dated 18.02.2017 is liable to be dismissed for the simple reason that the prayer with which they went before the APERC was to direct two distribution companies one located in Andhra Pradesh and another in Telangana, to make payment of differential tariff as fixed by the Joint Regulatory Body in O.P.No.17 of 2006. If two distribution Companies, one located in Telangana and another located in Andhra Pradesh are to be directed to make some payment, a direction can be issued only by the CERC and not by any one of the State Commissions. Therefore, W.P.No.14033 of 2017 is dismissed.

(v) W.P.Nos.38217, 45376 and 45378 of 2016 and W.P.No.30274 of 2018 are allowed and the order of the TSERC dated 31.10.2016, insofar as it enables the splitting up of the disputes into two parts for the purpose of entertaining petitions, is set aside.

(vi) W.P.Nos.11353 and 14254 of 2016 are allowed and it is declared that the disputes involving generating companies, relating to regulation of interstate transmission of electricity or determination of tariff for interstate transmission, shall be decided only by the CERC. The disputes relating to regulation of tariff of generating companies which have entered into or which otherwise have a composite scheme for generation and sale of electricity in more than one State shall also fall only within the jurisdiction of CERC. The disputes arising out of single Power Purchase Agreement which the generating companies had with the distribution companies in the composite State of Andhra Pradesh, shall be deemed to have become a composite scheme for the generation and sale of electricity in more than one State under Clause (b) of Section 79 (1), if those distribution companies have now got located in the bifurcated States.

(vii) W.P.No.36266 of 2018, does not challenge any order of any of the Commissions. The prayer in the writ petition is for a direction to the Eastern and Southern Power Distribution Companies of Andhra Pradesh and Central Power Distribution Company of Telangana to make payment of the rebates allegedly retained by the respondents against the terms of the purchase orders. The petitioner has chosen to come up with the

above writ petition without approaching any of the Commissions on the ground that the APERC lost jurisdiction after the bifurcation of the State. But in such cases the appropriate remedy open to the petitioner is only to go to CERC. Therefore, W.P.No.36266 of 2018 is dismissed giving liberty to the petitioner to approach the CERC for the redressal of their grievances.

(viii) W.P.No.8143 of 2017 is filed challenging the refusal of the Southern Power Distribution Company of Andhra Pradesh to release payments due to them. The problem of the petitioner is peculiar since the petitioner had an agreement with the Central Power Distribution Company, for carrying out high voltage distribution system certificate on the agricultural feeders in Kurnool District. The project was a turnkey project. After the bifurcation of the State the Central Power Distribution Company became a part of Telangana State, but the District of Kurnool went to the Southern Power Distribution Company of Andhra Pradesh. But the Southern Power Distribution Company has now refused to release payment on the ground that the work so executed in Kurnool District when it was part of the Central Power Distribution Company, has benefitted a company which has now gone to the State of Telangana. But this logic is flawed, as the place where the project is executed is now in Andhra Pradesh. The dispute that the petitioner has, is not one of the disputes covered by Clauses (a) to (d) of sub-section (1) of Section 79. The petitioner does not appear to be a Power Generating Company. Therefore, the dispute will also not fall within Section 86 (1) (f). Therefore, the writ petition is maintainable and the only ground on which the claim was rejected by the impugned letter dated 07.01.2016 is wholly illegal and unconstitutional. Therefore, W.P.No.8143 of 2018 is allowed. The impugned communication is set aside and the matter is remanded back to the 1st respondent for a reconsideration on merits.

(ix) W.P.No.7965 of 2016 is for a declaration that the CERC is the appropriate forum having jurisdiction to decide the disputes between the petitioner and the four distribution companies. In view of our findings, this writ petition is to be allowed. Accordingly, it is allowed directing the

TSERC and APERC to transfer the pending proceedings to the file of the CERC for adjudication.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed. There will be no order as to costs.”

9) Further, the said order of the Hon’ble High Court was questioned by the DISCOMs before the Hon’ble Supreme Court in Civil Appeal No.3788–3790 of 2019 and batch. The said appeals were dismissed by the Hon’ble Supreme Court confirming the order of the Hon’ble High Court. The Hon’ble Supreme Court has held as below:

- “1. *Diary No.44511/2019 is taken on board.*
2. *Delay of 254 days in filing the special leave petition, in Diary No.44511/2019, is condoned. Leave granted.*
3. *Heard learned counsel for the parties.*
4. *As the controversy involves State of Andhra Pradesh as well as the State of Telangana and ultimate effect is going to be on more than one State, considering the provisions contained in Section 105 of the Andhra Pradesh (Reorganization) Act, 2014, CERC is appropriate authority to hear and decide the dispute. In the facts and circumstances of the case, we find no ground to interfere with the decision of the High Court.*
5. *Let the dispute be decided by CERC, in accordance with law, after hearing the parties, as expeditiously as possible, within an outer limit of six months.*
6. *The appeals are, accordingly, disposed of.*
7. *Pending application(s), if any, shall stand disposed of.”*

10) The Commission notices that issue raised in the present petition involves two DISCOMs of the State of Telangana and two DISCOMs of the State of Andhra Pradesh. The Commission cannot segregate the relief and pass an order in respect of the two DISCOMs only, while the issue arose in the combined State of Andhra Pradesh and the matter cannot be decided by one Commission. As such this matter cannot be adjudicated by the Commission in view of the observations of the Hon’ble High Court and as reiterated by the Hon’ble Supreme Court.

11) The Commission is of the view that, the only course open to it is, to transfer the matter pending before the Commission, to the CERC.

12) In view of the above legal position and the submission of the counsel for the petitioner and the representative of the respondents in the matter, the matter is transferred to further adjudication by CERC. Accordingly, the office is directed to take necessary steps to transfer the matter to CERC.

This order is corrected and signed on this the 09th day of June, 2021.

Sd/-
(BANDARU KRISHNAIAH)
MEMBER

Sd/-
(M.D. MANOHAR RAJU)
MEMBER

Sd/-
(T. SRIRANGA RAO)
CHAIRMAN

