



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 47 of 2021
&
I. A. No. 20 of 2021

Dated 21.11.2022

Present

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

Between:

M/s Mytrah Vayu (Godavari) Private Limited,
R/o 8001, Survey No.109, Q-City,
Nanakramguda, Gachibowli, Hyderabad 500 032.

... Petitioner

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office, # 6-1-50, Mint Compound, Hyderabad 500 063.
2. Transmission Corporation of Telangana Limited,
Vidyut Soudha, Khairatabad, Hyderabad 500 082.
3. Telangana State Power Coordination Committee,
6-3-572, Vidyut Soudha, Khairatabad,
Hyderabad – 500 082.

... Respondents

The petition came up for hearing on 08.11.2021, 20.12.2021, 03.01.2022, 31.01.2022 and 11.04.2022. Sri Deepak Chowdary, Advocate representing Sri. Challa Gunaranjan, Advocate for petitioner and Sri. Mohammad Bande Ali, Law Attaché for respondents have appeared through conference on 08.11.2021, Sri Challa Gunarajan, Advocate for petitioner and Sri. Mohammad Bande Ali, Law Attaché for respondents are present on 20.12.2021 and 03.01.2022. Sri. Sajan Poovayya, Senior Advocate along with Sri. Challa Gunaranjan, Advocate for petitioner and Sri. Mohammad Bande Ali, Law Attaché for respondents have appeared through video conference on

31.01.2022 and Sri. D. Prakash Reddy, Senior Advocate along with Sri. N.Sai Phanindra Kumar, Advocate for petitioner and Sri. Mohammad Bande Ali, Law Attaché for respondents are present on 11.04.2022. The matter having been heard through video conference on 08.11.2021, 31.01.2022 and physically on 20.12.2021, 03.01.2022 and 11.04.2022 and having stood over for consideration to this day, the Commission passed the following:

ORDER

The petitioner has filed a petition under Section 86 (1) (f) & (k) of the Electricity Act, 2003 (Act, 2003) seeking issuance of directions to respondent No.1 for payment of amount towards the energy generated over and above Capacity Utilisation Factor (CUF) as per the Power Purchase Agreement (PPA) in respect of its 100.8 MW wind power project located at Nazeerabad Village, Parigi Mandal, Rangareddy District. The petition has been taken on record of the Commission duly striking off the 3rd respondent i.e., TSPCC (party) from the array of respondents, as it is neither a statutory body nor is recognized authority under the Act, 2003 or the regulations made thereof by the Commission.

2. The averments mentioned in the petition are as below:
 - a. It is stated that the petitioner is generating company, as defined under Section 2(28) of the Act, 2003 and is engaged in the business of generation and sale of wind energy.
 - b. It is stated that the respondent No.1 is an electricity distribution company incorporated under the provisions of the Companies Act. 1956 and is wholly owned subsidiary of the government or Andhra Pradesh. The respondent No.1 is licensee in terms of Section 14 of the Act, 2003 and undertakes the distribution and retail supply of electricity in 13 districts of Telangana State.
 - c. It is stated that the respondent No.2 is an electricity transmission company incorporated in June 2014 along with creation of a new State, Telangana, from the pre-existing State of Andhra Pradesh in India, performing the functions of a transmission licensee in terms of the Act. 2003.
 - d. It is stated that the respondent No.3 - Telangana State Power Coordination Committee (TSPCC) is an entity created by the Government of Telangana to ensure coordination between the distribution companies of the State of Telangana. The functions of TSPCC include examination of all commercial

issues related to bulk supply and all legal issues related to power developers and advise TSDISCOMs suitably. Further, all invoices raised by wind & solar power developers are submitted before and processed by TSPCC. TSPCC is 'State' within the ambit of Article 12 of the Constitution, being a wholly owned Government company performing functions of a public utility.

e. It is stated that the Act 2003, the National Electricity Policy, 2005 (NEP) and the National Tariff Policy, 2016 (NTP) *inter alia* promote co-generation and generation of electricity from wind and other sources of renewable energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. The gist of the relevant provisions of the Act, 2003, NEP and the NTP are set forth herein below for the ease of reference:

- i) *Section 61(h) of the Electricity Act provides that the State Commission is required to specify the terms and conditions for determination tariff and in doing so, shall be guided by inter alia the promotion of co-generation and generation of electricity from renewable sources or energy;*
- ii) *Section 86(1)(e) of the Electricity Act provides that the State Commission is required to promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;*
- iii) *Articles 5.12.1 & 5.12.2 of the National Electricity Policy clearly indicate that the emphasis on the intention behind Section 86(1)(e) of the Electricity Act is to promote generation and co-generation from non-conventional and renewable sources of energy; and*
- iv) *Article 6.4 of the Tariff Policy mandates the State Commission to fix a purchase obligation for procurement of energy from non-conventional sources in order to promote the generation and procurement of non-conventional of sources energy.*

f. It is stated that that in view of the State Government's commitment to promote non-polluting sources of the energy, the Energy Department, Government of Andhra Pradesh (GoAP) on 11.04.2008 by way of G.O.Ms.Nos.48 and 99 issued Policy for Development of Wind Power in Andhra Pradesh (2008 Wind Power Policy). The operative period of the 2008 Wind Power Policy was 5 years

from the date of issuance thereof, unless/superseded or modified by any other order. Prior to the reorganisation of the State of Andhra Pradesh, the then Andhra Pradesh Electricity Regulatory Commission (erstwhile APERC) passed order on 01.05.2009, fixing a tariff of 3.50/kWh, with control period up to 31.03.2014. (2009 Tariff Order). Under the 2009 Tariff Order, the then APERC accepted CUF of 24.5% for the purpose of tariff determination. It is stated that the CUF or Plant Load Factor (PLF) is defined as the actual output from a renewable power plant over the year to the maximum possible output from it for a year under ideal condition. In general, the CUF of renewable power plants is required to be calculated on annual basis and termed as annual CUF. Further, the formula for calculating annual CUF in % [energy measured in units/(365 x 24 x installed capacity)] x 100.

- g. It is stated that owing to the limited incentives provided by the 2008 Wind Power Policy as well as the low tariff of Rs.3.50 per unit provided thereunder and ratified by the 2009 tariff order of the then APERC, the 2008 Wind Power Policy failed to attract the desired investments in the State between the period 2008 and 2012 and was only able to add a total capacity of only 110 MW in the State.
- h. It is stated that on 28.04.2010, the Central Electricity Regulatory Commission (CERC) promulgated the Indian Electricity Grid Code Regulations, 2010 (IEGC, 2010) wherein 'Must Run' status was accorded to all renewable based power plants under Regulation 6.5. The relevant extract of Regulation 6.5 of the IEGC, 2010 is reproduced herewith for ready reference;

“6.5 Scheduling and Despatch Procedure

... ..

11. *Since variation of generation in run-of-river power stations shall lead to spillage, these shall be treated as must run stations. All renewable energy power plants except for biomass power plants with installed capacity of 10 MW and above, and non-fossil fuel-based cogeneration plants, whose tariff is determined by the CERC shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch principles.’*

- i. It is stated that considering the context of power deficit in the State and the wind energy potential available, and the statutory responsibility vested in the Commission under Sections 61(h), 62, 86(1)(a), 86(1)(b) and 86(1)(e) of Act, 2003 to promote and encourage the harnessing of renewable energy, the then APERC curtailed the control period prescribed in the 01.05.2009 order upto 14.11.2012 vide its tariff order dated 15.12.2012 (2012 Tariff Order) issued

under Section 61(h) and 86(1)(e) of the Electricity Act, 2003, Clause 5.12.1 and 5.12.2 or NEP and Clause 6.4 of NTP. A bare perusal of the 2012 Tariff Order makes it clear that the generic tariff determined by the then APERC has to apply to all wind power projects for which a PPA was signed during the control period (15.11.2012 to 31.03.2015) of 2012 tariff order. Further, considering the said tariff was computed on a levelized basis taking into consideration the useful life of the projects, it was provided that such tariff will remain fixed for the useful life of the project i.e., 25 years.

- j. It is stated that by virtue of the aforementioned 2012 Tariff Order, the then APERC determined the CUF as 23% for the purpose of determination of generic tariff for all the wind power projects for all the PPAs after issuance of this order till 31.03.2015. Further, considering the useful life of a typical wind power plant as 25 years from the Commercial Operation Date (COD) of the plant, the then APERC vide its 2012 Tariff Order determined the tariff @ Rs.4.70 per unit for wind power projects on a levelized basis arrived at based on a discount rate of 10.62% for period of 25 years. Relevant paras of the 2012 Tariff Order have been extracted herein below for easy reference:

The Commission was also directed by the ATE in appeal No.194 of 2009 to determine the CUF after considering the wind power density map prepared by the Centre for Wind Energy Technology (C-WET)/Ministry of New & Renewable Energy. To encourage efficiency and optimal selection of sites, the Commission proposes to adopt 23% as CUF.

... ..

Keeping in view the suggestions made above and the patterns followed by the CERC and the other State ERC's mentioned above, the Commission considers a tariff period of 25 years as appropriate since the useful life of a typical wind power plant be reckoned as 25 years from COD of the plant. Hence, the Commission considers it appropriate to determine the tariff for a period of 25 years on a levelized basis arrived at based on a discount rate of 10.62%.

- k. It is stated that meanwhile, on 02.06.2014, the erstwhile State of Andhra Pradesh was bifurcated, and a new Telangana State was formed. As a consequence of this bifurcation, the district in which the project was being set up became a part of the Telangana State. On 10.12.2014 the Commission issued Regulation No.1 of 2014, adopting the then existing regulations, directions, orders issued by the erstwhile APERC. In pursuance of the aforesaid regulation, the Commission adopted the 2012 Tariff Order whereby the then APERC had fixed the preferential generic tariff and CUF for the wind power

projects entering into power purchase agreements with distribution companies from 15.11.2013 till 31.03.2015.

- I. It is stated that pursuant to the aforesaid Wind Policy, the erstwhile Andhra Pradesh New Renewable Energy Development Corporation Limited (NREDCAP) for undivided State of Andhra Pradesh, which is the State Nodal Agency formed by the State Government for the purpose of approving the renewable energy projects, had allotted 100 MW capacity wind power project in favour of M/s Mytrah Energy (India) Limited (MEIL) to be set up at Nazeerabad Village, Parigi Mandal, Rangareddy District vide letter dated 11.12.2013. In furtherance to the aforesaid letter, the petitioner entered into an agreement dated 11.12.2013 with NREDCAP whereunder, the petitioner undertook to endeavour to maximize the plant load factor as under:

ARTTICLE 6: OBLIGATIONS OF DEVELOPER

In addition to and not in derogation substitution of any of the obligations set out elsewhere in this Agreement, the Developer shall as mandatory obligation-

... ..

(c) explore the possibility of installing higher capacity Wind Electric Generators to achieve higher plant load factor and that the Wind Electric Generators under the project having the approval of C-WET shall only be installed.

- m. It is stated that subsequently at the request of MEIL, the said project was transferred in the name of the Petitioner by Telangana New & Renewable Development Corporation Limited (TNREDCL) in the name of the petitioner, which is a group Company of MEIL vide letter dated 09.02.2015. Accordingly, an agreement was entered into with TNREDCL on 19.02.2015 for establishment of 100 MW wind power project.
- n. It is stated that further at the request of the petitioner, TNREDCL vide its letter dated 06.01.2016 granted sanction for setting up and operation of the wind power project for generation of 0.80 MW capacity. Accordingly, the petitioner entered into an agreement with TNREDCL on 06.01.2016 for establishment of 0.80 MW wind power project.
- o. It is stated that in the meanwhile, the then project proponent i.e., MEIL had applied to the erstwhile Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) for the grant of connectivity to the project for the purpose of evacuation of power. In response thereto, APTRANSCO vide its letter dated 19.11.2012 accorded connectivity approval for the said project. Further,

pursuant to the addition in the capacity of the project, as mentioned hereinabove, MEIL applied to the Transmission Corporation of Telangana Limited (TSTRANSCO) for additional 0.80 MW capacity evacuation on the existing approval accorded for 100 MW wind power project. Accordingly, TSTRANSCO by way of its letter dated 21.09.2015, accorded approval for enhancement of installed capacity of the power plant from already approved capacity of 100 MW to 100.80 MW capacity connectivity approval for the said project.

- p. It is stated that on 26.03.2015, the petitioner entered into PPA with respondent No.1 for sale of 100 MW wind power from its project. Under Article 2 of the PPA, the respondent No.1 was obligated to purchase the "*Delivered Energy*" at the interconnection point, without any restriction on CUF at the agreed tariff of Rs.4.70 per unit as under:

"1.5 *Delivered Energy means with respect to any Billing Month the kilo watt hours (kWh) of electrical energy generated by the Project and delivered to the DISCOM at the Interconnection Point during that Billing Month.*
Explanation 1: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project, by the main plant and equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at the Interconnection Point.
Explanation 2: The delivered energy in Billing Month shall be limited to the energy calculated based of the Capacity agreed for export to network for sale to DISCOM as mentioned in Preamble and Schedule-I, multiplied with number of hours and fraction thereof the projects in operation during that billing month. In case any excess energy is delivered no payment shall be made for the same.

-
2.1 *All the Delivered Energy at the interconnection point for sale to DISCOM will be purchased at the tariff provided for in Article 2.2 from and after the Commercial Operation of the Project. Title to Delivered Energy purchased shall pass from the Wind Power Producer to the DISCOM at the Interconnection Point.*
2.2 *The Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at Rs.4.70 per unit for a period of 25 years from the Commercial Operation Date (COD) as per APERC order No.13/2012 dt. 15.11.2012."*

The capacity of the project under the PPA was later amended to 100.8 MW vide Amended PPA dated 09.01.2017 which was approved by the Commission vide its letter dated 03.01.2017, The PPA dated 26.03.2015 and the amended PPA dated 09.01.2017 governs the obligations as entered into between the petitioner and respondent No.1.

- q. It is stated that further, in order to incentivize timely payments towards the bills generated by the petitioner, PPA envisages a provision entitling the DISCOM/ respondent No.1 to a rebate of 1% on total billed amount, if the payments are made before the due date. The said provision has been made in Article 5 of the PPA, which reads as under:

ARTICLE 5: BILLING AND PAYMENT

- 5.1 *For Delivered Energy purchased, Wind Power Producer shall furnish a bill to the DISCOM calculated at the rate provided for in Article 2.2, in such form as may be mutually agreed between the DISCOM and the Wind Power Producer, for the billing month on or before the 5th working day following the Meter Reading Date.*
- 5.2 *The DISCOM shall be entitled to a rebate of 1% of the total billed amount in any billing month for payments before the date of payment. Any payment made beyond the due date of payment, DISCOM shall pay interest at existing SBI base rate plus one percent and in case this rate is reduced, such reduced rate is applicable from the date of reduction.*

Further, the "Due Date" as provided hereinabove, has been defined in Article 1 of the PPA as under:

- 1.7 ***Due Date of Payment:*** *means the date on which the amount payable by the DISCOM to the Wind Power Producer hereunder for Delivered Energy, if any, supplied during a Billing Month becomes due for payment, which date shall be thirty (30) days from the Meter Reading Date provided the bill is received by DISCOM within 5 days from Meter Reading Date, and in case of any supplemental or other bill or claim, if any, the due date of payment shall be thirty (30) days from the date of the presentation of such bill or claim to the designated officer of the DISCOM."*

A bare perusal of the above provisions in PPA makes it clear that the only scenario in which the respondent No.1 could allowed to claim rebate on the billed amount, is when the payment is made before the due date.

- r. It is stated that thereafter, the petitioner successfully commissioned 100.80 MW wind power project at Nazeerabad, Parigi (M) Rangareddy district, during March 2017; which is the first wind power project in the Telangana State in the following phases:

Sl. No.	Commissioned Capacity (MW)	Date of synchronization
1	46.2	27.03.2016
2	31.5	31.03.2016
3	21.0	31.05.2016
4	2.1	06.03.2017
Total	100.80	

- s. It is stated that after the commissioning of the project, the petitioner started supplying power to respondent No.1, in terms of the obligations under the PPA. Accordingly, the petitioner also started raising invoices towards such supply of power, whereunder, the respondent No.1 was obligated to make payments towards the energy generated over and above 23% CUF of the Project. Accordingly, respondent No.1 made payment from April 2016 till September 2020 towards the energy delivered at the interconnection point. However, since June 2017, Respondent No.1 arbitrarily and without any reasonable justification stopped making payments towards invoices raised for the energy delivered beyond 23%. It is pertinent to note that the petitioner has been continuously raising invoices upon the respondent No.1 for the energy delivered in terms of the PPA. However, respondent No.1 has not responded to such invoices till date.
- t. It is stated that the above action of respondent No.1 i.e., the non-payment of dues towards energy generated by the petitioner's project beyond the CUF, is in fact coercing the petitioner to curtail its power generation. It may be mentioned here that such curtailment of power is in direct contravention of the "must run" status, statutorily accorded to the petitioner by virtue of IEGC, 2010 and also granted by MNRE through issuance of various letters. It is humbly submitted that the MNRE has issued the following communications in this regard:
- (i) Letter dated 20.12.2017 of MNRE to the Government of Andhra Pradesh.
Taking into consideration the non-receipt of full payments against the energy injected over and above 23.5% CUF from distribution companies in the State of Andhra Pradesh, MNRE had suggested the Government of Andhra Pradesh that suitable directions may be issued to the DISCOMS for honoring the PPAs as also honour 'must run' status to Wind Power Projects.
- (ii) Letter dated 11.09.2018 of Government of Andhra Pradesh to Andhra Pradesh Transmission Corporation Limited (APTRANSCO) and AP DISCOMS.
By way of the said letter, the DISCOMS in the State of Andhra Pradesh had been directed to treat wind power as "must run stations" and take

the entire power from them without curtailment. Further, the same protocol was to be followed for all the wind projects since their commissioning.

(iii) Minutes of Meeting of MNRE dated 07.11.2019 for discussion on various issues relating to RE Power Sector.

The issue of curtailment of RE power was discussed as under:

“Secretary, MNRE, informed the representative of the State Government of Andhra Pradesh that both solar and wind power enjoy ‘must run’ status and no curtailment can be done in supply of solar and wind power except for the reasons of grid failure. Representatives of State Government of Andhra Pradesh informed that at present no curtailment is taking place and in case it happens it should be brought to their notice immediately. It was clarified that in case State Government resorts to curtailment of solar or wind power for reasons other than grid safety, the State Utility would be bound to pay for the curtailed power as it enjoys ‘must run’ status.

Decision: In case State Government resorts to curtailment of solar or wind power for reasons other than grid safety, the State Utility would be bound to pay for the curtailed power as it enjoys ‘must run’ status.”

(iv) Office Memorandum dated 01.04.2020 issued by MNRE regarding clarification with respect to payments to Renewable Energy Generating Stations during the moratorium provided to DISCOMs by Ministry of Power

“2. Since then, this Ministry has received representations from Renewable Energy (RE) industry that certain State DISCOMs, citing the said order of Ministry of Power, as mentioned in para (1) above, have started curtailing RE power in some States partially and others completely terming prevailing situation as Force Majeure condition.

3. The matter has been examined in detail and in this regard, following clarifications are issued:

(a) Must-Run Status to RE Projects

Renewable Energy (RE) Generating Stations have been granted 'must-run' status and this status of 'must-run' remains unchanged during the period of lockdown.

(b) *Regular Payment to RE Generating Stations:*

Since DISCOMs have already been given sufficient relief as mentioned in para (1) above and as electricity from Renewable Energy (RE) Generating Stations comprises only a minor portion of the total electricity generation in the country, the payments to RE generators be done on regular basis as was being done prior to lockdown as per procedure established since 01.08.2019."

It is stated that a bare perusal of the aforementioned communications issued by the MNRE make it clear that the "must run" status accorded to the renewable energy generating stations, including the Petitioner's Project is not to be breached under any circumstances and as such, the payment obligations with respect to the power generated by such projects are to be mandatorily fulfilled.

- u. It is stated that aggrieved by the non-payment by respondent No.1 towards energy generated over and above 23% CUF pertaining to the project, the petitioner issued various communications to respondent No.2 seeking issuance of necessary directions to respondent No.1 for release of aforesaid dues. For instance, the petitioner vide its recent letter dated 14.08.2020 requested respondent No.2 as under:

"At the outset, we are thankful to your good offices for clearing payments on regular basis. We understand that from payments to be received that an amount at Rs.68,71,32,245/- is withheld for the period FY 18. FY 19, and FY 20 on account of CUF restriction of 23% for our 100.8 MW wind power project on cumulative yearly basis. The pending receivables as on date is Rs.120.54 crore which is more than one-year receivables for the project,

In this regard, we would also like to draw your kind attention to Article 2 of PPA, which is reproduced as below:

"Article 2: Purchase of Delivered Energy and Tariff,

2.1. *All the delivered energy at interconnection point for sale to DISCOM will be purchased at the tariff provided for in Article 2.2 from and after the COD"*

As per the above Clause. the entire delivered energy should be purchased by DISCOM without any restriction on CUF either monthly or cumulatively at the end of COD year.

Further, we invite reference to the Hon'ble Ministry of Power D.O. cited at ref (4) dated 20.12.2017 and relevant extract reproduced as follows and further directed DISCOMs for honouring the PPAs:

"The generic wind tariff determined by the erstwhile APERC may have taken 2.3% CUF as average CUF in the state for wind power projects and therefore, it is likely that there may be certain sites when CUF is more than the average CUF. Further, under the provisions of Indian Electricity Grid Code, wind power being renewable source of energy has been given "Must Run Status."

We would like to inform you that the restrictions on CUF parameter adversely affect the viability of the project, since the project is financed assuming certain receivables based upon the generation profile arrived at carefully assessing the wind potential in the region. Hence, restricting PLF would severely impact the realization potential of the wind project and thus put our assets under the risk of becoming NPA.

.....

As described above, the non-payment of the due amounts as per the agreed terms and conditions of the PPA has severely affected the cash-flow, making it extremely difficult to timely service the debt and fulfil other obligations to various stakeholders. The credit rating agencies are downgrading the rating of wonderfully performing asset and the lenders are threatening to take serious action.

Under this circumstance, we humbly request your good office to not restrict our payments (understood to be of CUF restriction) and make our receivables of Rs.68.71 crore eligible for payment."

It is stated that it is pertinent to note that as on date CUF payments to the tune of Rs.78.84 crore are pending since June 2017.

- v. It is stated that in addition to the above, respondent No.1 has arbitrarily claimed rebate of 1% on the billed amount. The above action of respondent No.1 is arbitrary and illegal inasmuch as the respondent No.1 has failed to comply with the conditionality to claim such rebate, as envisaged in the PPA. Despite making the payments for the period between April, 2016 and December, 2016 beyond the due date, the respondent No.1 has wrongly claimed rebate amounting to Rs.60,05,890/-. As such, it is imperative that a direction be issued to respondent No.1 to refund the aforesaid amount to the petitioner. In view of the foregoing facts and circumstances and the financial crisis of the petitioner owing to the non-payment towards the energy generated by the Petitioner over and above 23% CUF since June 2017, the petitioner is filing the instant petition before the Commission seeking issuance of directions to Respondents to release the aforesaid payments.

3. The petitioner has raised the following grounds in the petition.

- a. It is stated that the petitioner is supplying the entire power generated only to respondent No.1, in terms of the PPA. In such circumstances, the respondent No.1 ought to make the payments as raised in the tariff invoices from time to time and without disallowing any portion on account of generation beyond 23% CUF. The respondent No.1 cannot enjoy the benefits thereof and is bound to compensate the petitioner for the entire power injected in the grid.
- b. It is stated that the liability of respondent No.1 to purchase the "Delivered Energy" at the interconnection point, without any restriction on CUF at the agreed tariff of Rs.4.70 per unit is encapsulated under Article 2 of the PPA. Therefore, respondent No.1 is under contractual obligation to make the CUF payments to the petitioner. The relevant excerpts of Article 2 of the PPA are set out herein below:

"2.1 All the Delivered Energy at the interconnection point for sale to DISCOM will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the Project. Title to Delivered Energy purchased shall pass from the Wind Power Producer to the DISCOM at the Interconnection Point.

2.2 Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at Rs.4.70

per unit for a period of 25 years from the Commercial Operation Date (COD) as per APERC order No.13/2012 dt, 15.11.2012.”

- c. It is stated that respondent No.1 has failed to perform the reciprocal obligations as per the terms of the PPA which requires the respondent No.1 to pay the bills of the petitioner promptly, the non-payment for the energy delivered beyond 23% by the petitioner to the respondent No.1 has become a perennial problem. Further, it is also a clear case where petitioner despite acting and complying with its set of obligations in PPA is not correspondingly being benefited due to the unlawful act of Respondent No.1, hence, such act being in violation of settled principles of “*reciprocal promise*” as provisioned in the Indian Contract Act, 1872. On account of not timely receiving the due and payable amount against its invoices under the PPA, the petitioner is facing acute distress. It is stated that if this issue is not resolved by the Commission timely, it inevitably has the potential to turn the present Project into a non-performing asset. Thus, it is very important for the Commission to take into consideration the issues highlighted in this petition hereinafter and provide the requisite resolution as being sought by the petitioner.
- d. It is stated that there is no provision either in PPA or in 2012 Tariff Order, which specifies that the excess generation in terms of units beyond the norm of 23% of annual CUF shall be deducted and not be considered for payment. The benchmarking of CUF at 23% was only considered for the purpose of determination of the generic tariff @ Rs.4.70/unit. It is submitted that by withholding the aforesaid legitimate dues, the Respondent No.1 is making an attempt to shirk away from its contractual obligations. It is not open to the respondent No.1 to unilaterally choose and command the petitioner with their erroneous understanding but rather are under bounden duty to comply with the provisions of the PPA.
- e. It is stated that the petitioner is placed in a position where despite the maximum production they are unable to get revenue from the power being delivered to the respondent No.1. The petitioner is complying with its contractual obligation and supplying the entire power being generated to the distribution grid. Therefore, the petitioner cannot be put to revenue loss. This will have a direct impact on the viability of the project as well as ensuring financial returns for project activity,

- f. It is stated that on account of not timely receiving the due and payable amount against its invoices under the PPA, the petitioner is facing acute distress as it has become very difficult for it to service its debt and it is likely to default on its financial obligations as per the agreements with the lenders. It is the case of the petitioner that despite being under an obligation to purchase the entire energy generated by the petitioner, no payments for energy generated above 23% CUF level have been made by the respondent No.1 since June, 2017.
- g. It is stated that due to non-receipt of payments towards the energy generated above 23% CUF level, the petitioner is suffering undue hardship and severe cash crunch, besides loss of reputation and imminent punitive action by the lenders. As respondent No.1 has withheld the lawful tariff payments due to the petitioner, the petitioner has not been able to make full payments to the project contractors. Further, the petitioner is unable to manage its long term and short-term debt service obligations to its lenders and if respondent No.1 does not release the due payments immediately, the lenders may take serious steps, more particularly in view of the stringent banking norms recently announced by the RBI. As a consequence of such action of respondent No.1, the petitioner is also not able to meet its other financial and working capital commitments, both in relation to the project and the corporate, ever since the respondent No.1 stopped making payments towards the legitimate dues. The situation has now reached alarming proportions, with serious backlash and impact on other elements of petitioner's business.
- h. It is stated that the primary objective of the Act, 2003 is to promote and facilitate renewable energy generation in the country, as is also clear from the preamble of the Act, 2003. This is the substantive goal to be achieved, is pertinent to mention here that the project of the petitioner is the first wind power project to be developed and commissioned in the Telangana State. However, the arbitrary and illogical actions of respondent No.1 have been causing grave prejudice to the petitioner and are in fact against the tenets envisaged in the Act, 2003. The petitioner has relied on the judgment dated 26.04.2010 in Appeal No.57/2010 titled *M/s Century Rayon Vs. MERC & Ors.* held as under:
- “20. As a matter of fact, the reading of the Section 86(1)(e) along with the other Sections, including the definition Section and the materials placed on record by the Appellant would establish that the intention of the legislature is to promote both co-generation irrespective of the usage of

fuel as well as the generation of electricity from renewable source of energy,

21. *It is no doubt true that the generation of electricity from renewable sources is to be promoted as per Section 86(1)(e) of the Act. It is equally true that co-generation of electricity is also to be promoted as it gives several benefits to the society at large. Various records produced by the Appellant would also indicate that the co-generation produces both electricity and heat and as such it can achieve the efficiency of up to 90% giving energy saving between 15-40% when compared with the separate production of electricity from conventional power stations and production of steam from boiler.”*

i. It is further stated that the Hon'ble Appellate Tribunal for Electricity vide its Judgment in the case of *Rithwik Energy Vs. Transmission Corporation of Andhra Pradesh*, 2008 (ELR) (APTEL) 237, has held as under: -

“34. *A distinction, however, must be drawn in respect of a case, where the contract is re-opened for the purposes of encouraging and promoting renewable sources of energy projects pursuant to the mandate of Section 86(1)(e) of the Act, which requires the State Commission to promote cogeneration and generation of electricity from renewable sources of energy.*

35. *The preamble of the Act also recognizes the importance of promotion of efficient and environmentally benign policies. It is not in dispute that non-conventional sources of energy are environmentally benign and do not cause environmental degradation.”*

j. It is stated that 23% CUF determined by the then APERC was merely an average. The aforesaid figure is arrived at after taking into account some efficient and inefficient plants. It is stated that in view of the petitioner's project being efficient, especially in the months of June-September, being the high wind seasons. In the said months, the Project generates a CUF of 50-60% on monthly basis and the curtailment by Respondent No.1 to 23% CUF impacts the financial stability of the petitioner severely.

k. It is stated that the principle of restitution is enshrined in Section 70 of the Contract Act which states that a person enjoying the benefit of non-gratuitous act is liable to compensate the other party in respect thereof. The relevant extract of Section 70 is reproduced herewith for ready reference:

“Section 70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

It is stated that the respondent No.1 cannot be allowed to reap benefits without making payments to the petitioner as the same would be inter alia against

Section 70 (Obligation of person enjoying benefit of non-gratuitous act) of the Indian Contract Act, 1872 as well as the doctrine of unjust enrichment.

- l. It is stated that in view of the above, the action of respondent No.1 of illegally retaining the money due and payable to the petitioner clearly amounts to unjust enrichment of respondent No.1 at the behest of the petitioner. Such arbitrary action is against the fundamental principles of justice, equity, and good conscience. Further, the principle of restitution mandates that a party who suffers unjust enrichment must necessarily be restituted. Therefore, respondent No.1 is liable to compensate the petitioner for the entire quantum of energy being injected into the grid as the same has been done in terms of the contractual provisions between the parties. Further, the quantum of energy (even beyond CUF of 23%) is being utilised by respondent No.1. Thus, respondent No.1 cannot be allowed to reap benefits without making payments to the petitioner as the same would be against the provisions of the Indian Contract Act, 1872 as well as the doctrine of unjust enrichment.
- m. It is stated that the procedure provided under the law or as agreed between the parties to a contract has to be strictly adhered to, in the absence of which, no party is entitled to claim its right as provided under the said law or a contract. It is humbly submitted that sanctity of contract, is from all accounts of a fundamental concept for an orderly society to be safeguarded by the courts. Sanctity of contract cannot be allowed to be lost to unilateral action that would promote breaches of contract. In the case of *Gujarat Urja Vikas Nigam Limited Vs. ACME Solar Technologies (Gujarat Pvt) Ltd and Ors.*, cited as (2017) 16 SCC 498, the Hon'ble Supreme Court has held that the parties were bound by the terms and conditions of the PPA. Further, it was also stated that even the State Commission and the Tribunal cannot go beyond the said terms and conditions. The objective of the Hon'ble Supreme Court was to uphold the sanctity of obligations under the PPA executed between the parties. It follows that the respondent No.1 cannot be allowed to violate the binding obligations under the PPA, particularly with respect to purchase of the entire energy delivered by the petitioner at the interconnection point and payment towards the same.
- n. It is stated that the actions of respondent No.1 by withholding the legitimate dues towards the energy generated at more than 23% CUF levels is contrary

to the specific directions issued by Ministry of Power, MNRE whereunder “must-run” status had been accorded to the renewable energy based power plants. Further, the petitioner has also been accorded a ‘must run’ status under the IEGC, 2010. The arbitrary actions of respondent No.1 of withholding the rightful payments precludes the Petitioner from injecting the entire power into the grid, thereby, curtailing the power from the petitioner’s project and as such, contravening the specific directives issued by MNRE.

- o. It is stated that it is the case of the petitioner that there is a wilful and consistent abdication of the statutory obligations by the respondent No.1 in granting the ‘must run’ status to the project and that the project cannot be subjected to any eventuality where power is not allowed to be injected in the grid, only exception being that the safety and security of the grid is under threat. It is the case of the petitioner that the project of the petitioner is under constant threat of being refrained from injecting power in the grid by limiting the payments up to 23% CUF, which cannot be allowed in terms of the ‘must run’ status accorded to the project.
 - p. It is stated that the instant petition is made bona-fide and in the interest of justice. It is stated that the respondent No.1 has an obligation to make payments in the spirit of the PPA. It is further stated that unless remedial steps are taken, the interests of the petitioner will be severely prejudiced. Therefore, the petitioner by this petition seeks the intervention/approval of the Commission to resolve issues herein raised and also pass such directions as it deems appropriate to ensure that the interest of the petitioner is protected.
 - q. It is stated that unless the prayers made herein below are granted in favour of the petitioner, the petitioner shall suffer irreparable loss and harm to its business which also affects the viability and feasibility of its project.
4. Therefore, the petitioner has sought the following prayer in the petition for consideration.
- i) Hold and declare that the actions of Respondent No.1 withholding payments towards the energy generated over and above 23% CUF and curtailment of power are in contravention of the provisions of PPA and governing framework including ‘must run’ status accorded to the Petitioner by MNRE and under the IEGC 2010;

- ii) Issue appropriate direction(s)/order(s) to Respondent No.1 to make payments towards the energy generated over and above 23% CUF pertaining to the project along with Late Payment Surcharge;
- iii) Issue appropriate direction(s)/order(s) to Respondent No.1 to refund payments towards wrongly claimed rebate for the period between April 2016 and December 2016 to the petitioner;
- iv) Allow legal and administrative costs incurred by the Petitioner in pursuing the instant Petition;

5. The petitioner has also filed an interlocutory application and sought the following prayer in the application:

“To direct the respondent No.1 not to deduct for generation beyond 23% and consequently to make payments in full towards the invoices raised by the petitioner for the energy generated and supplied by the petitioner.”

6. The respondent has filed its counter affidavit as under:
- a. It is stated that the then APERC in the united State of Andhra Pradesh vide order dated 15.11.2012 in O.P.No.13 of 2012 determined the preferential generic levelized tariff over 25 years for Wind power generation projects that would enter into PPAs with DISCOMs between 15.11.2012 and 31.03.2015 at Rs.4.70 per unit.
 - b. It is stated that further vide letter dated 01.08.2014, the Commission, while communicating the approved Model PPA format, ordered that the PPAs executed between DISCOMs and Wind Power Developers in these formats upto 31.03.2015 shall be deemed to have been regulated by it and no separate consent from the Commission would be required. It further directed that the concerned DISCOM should file a copy of the executed PPA to the Commission for record sake.
 - c. It is stated that after bifurcation of the State, the TSERC vide Regulation No.1 of 2014 dated 10.12.2014, adopted the Regulations, directions and orders of the erstwhile APERC.
 - d. It is stated that accordingly, TSSPDCL entered into PPA with M/s Mytrah Vayu (Godavari) Private Limited on 26.03.2015 for purchase of power from the

developer's 100 MW wind power project located at Nazeerabad Village, Parigi Mandal, Ranga Reddy District.

- e. It is stated that subsequently a first amendment agreement was entered by TSSPDCL on 09.01.2017 duly enhancing capacity of project from 100 MW to 100.8 MW (48x2.1 MW).
- f. It is stated that in terms of the earlier Commission's directions dated 01.08.2014, the said PPA is deemed to have been regulated and consented by the Commission.
- g. It is stated that further, the draft amendment agreement enhancing the capacity from 100 MW to 100.8 MW was submitted to TSERC for consent vide letter dated 03.12.2016. The Commission, vide letter dated 03.01.2017, granted consent to the proposal to amend the PPA capacity from 100 MW to 100.8 MW and also accorded approval to the draft PPA amendment.
- h. It is stated that the total capacity of 100.8 MW was synchronised with the grid and the COD of the project was declared as 27.03.2016 in terms of Article 1.4 of PPA dated 26.03.2015.
- i. It is stated that the petitioner in the present petition is basically contending two issues, viz.,
Issue-1: Non-payment for the energy delivered over and above 23% CUF; and
Issue-2: Refund of payments towards wrongly claimed rebate for the period between April 2016 and December, 2016;
In the matter of Issue-1: Non-payment for the energy delivered over and above 23% CUF, it is stated the following:
 - i. The petitioner is praying for payment for the energy delivered above the 23% CUF on the following grounds:
 - (a) The liability of the DISCOM to purchase the delivered energy at the interconnection point at the agreed tariff under Article 2 of the PPA;
 - (b) In view of the must-run status accorded to their project, the energy from the project shall not be curtailed;
 - (c) Letter dated 20.12.2017 of MNRE to the Government of Andhra Pradesh;
 - (d) Letter dated 11.09.2018 of Government of Andhra Pradesh to APTRANSCO & APDISCOMs;

- ii. The following Clauses of the PPA related to Issue no.1–

Article 1.5

Delivered Energy: means, with respect to any Billing Month, the kilo watt hours (kwh) of electrical energy generated by the Project and delivered to the DISCOM at the Interconnection Point as defined in Article 1.11, as measured by the energy meter at the Interconnection Point during that Billing Month.

Explanation 1: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project, by the main plant and equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at Interconnection Point.

Explanation 2: The delivered energy in a Billing Month shall be limited to the energy calculated based on the capacity agreed for export to network for sale to DISCOM as mentioned in Preamble and Schedule-1, multiplied with number of hours and fraction thereof the project is in operation during that billing month. In case any excess energy is delivered no payment shall be made for the same.

ARTICLE 2

2.1 All the Delivered Energy at the interconnection point for sale to DISCOM will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the Project. Title to Delivered Energy purchased shall pass from the Wind Power Producer to the DISCOM at the Interconnection point.

2.2 The Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at Rs.4.70 per unit for a period of 25 years from the Commercial Operation Date (COD) as per APERC order No 13/2012 dt:15.11.2012.

- iii. It is evident from the above, that the petitioner cannot cherry pick Article 2.2 of the PPA and pray for payment of bills at a tariff of Rs.4.70/unit for the units delivered beyond 23% CUF, but this Article 2.2 shall be read in conjunction with Article 1.5 which stipulates that no payment shall be made to the energy delivered beyond the capacity agreed to.
- iv. Further, the genesis of contract (PPA) between TSSPDCL and M/s Mytrah Vayu (Godavari) Private Limited is the then APERC order dated 15.11.2012 issued in O.P No.13 of 2012, which is even iterated by the petitioner also.
- v. As such, even Article 2.2 of the PPA stipulates that payment for the energy delivered shall be as per APERC order dated 15.11.2012.
- vi. Therefore, it is abundantly clear that the operation of terms and conditions of the PPA are governed by the APERC order dated 15.11.2012.

- vii. It is pertinent to submit that the then APERC has taken the following parameters into consideration for determination of preferential levelized generic tariff of Rs.4.70/unit for the Wind power projects (that would enter PPA between 15.11.2012 and 31.03.2015):

Sl.	Parameter	Value
a	Tariff Period	25 Years
b	Useful life	25 Years
c	Capital Cost	Rs.5.75 crore/MW (including evacuation cost)
d	O&M Cost	Rs.7.4 lakh/MW with escalation of 5% per annum
e	Depreciation	4.5% for 1 st 10 years and 3% from 11 th year onwards on straight line basis
f	Capacity Utilisation Factor (CUF)	23%
g	Return on Equity	20% pre-tax for first 10 years and 24% pre-tax from 11 th year onwards
h	Interest Cost on Debts	12.30% per annum
i	Tenure of Loan	10 years
j	Interest on Working Capital	12.80% per annum
k	Debt Equity Ratio	70:30
l	Discount Rate	10.62%

- viii. With the above parameters, including CUF of 23%, considering the useful life of a Wind power plant as 25 years, the levelised preferential generic tariff for a 25 year period, worked out to Rs.4.6995 per kWh. The Commission accordingly, considered it reasonable to fix the preferential levelised generic tariff at Rs.4.70 per kWh in the order dated 15.11.2012 in O.P.No.13 of 2012.
- ix. This indicates that the entire capital cost along with other incidental costs (Interest on Debt, O&M charges, Working capital requirements, Depreciation etc.,) and returns (RoE) are apportioned to the energy units calculated with 23% CUF and accordingly the tariff of Rs.4.70/unit is arrived. As such, all the costs are recovered in the tariff when the plant operates at 23% CUF and hence the Commission in its order dated 15.11.2012, which forms the basis for this PPA, did not indicate any Tariff for the energy beyond 23% CUF.
- x. In other words, the tariff @ Rs.4.70/kWh would enable the wind power developer to meet all the expenditure duly providing returns by way of

Return on Equity for the capital invested when the plant operates at 23% CUF and as such claiming for payment for the energy delivered beyond 23% CUF is not justified.

- xi. As one goes through the calculation done for arriving at a tariff of Rs.4.70/unit in the Commission order dated 15.11.2012, it can be understood that had the Commission considered CUF more than 23%, the tariff would have been lower than Rs.4.70/unit. Accordingly, any generation beyond 23% threshold CUF has not been factored for pricing/tariff fixation; hence, no payments can be paid for such energy.
- xii. The following table further illustrates the fact that higher the CUF, lesser the tariffs determined:

State	CUF	Tariff	Fixed by	Applicable Period
United AP	23%	4.70	APERC	15.11.12 to 31.03.15
Tamil Nadu	27.15%	4.16	TNERC	1.4.16 to 31.3.18
Karnataka	26%	4.50	KERC	10.10.13 to 09.10.18
Maharashtra	30%	4.18	MERC	01.01.16 to 31.03.16
	32%	3.92		
-	30%	4.39	CERC	01.04.15 to 31.03.16
	32%	4.11		

- xiii. In addition to the above, even this Hon'ble Commission, in its Generic Tariff order for Wind Power Projects dated 06.10.2018 issued for control period 2018-20 (which has been challenged by TSDISCOMs and is pending before APTEL), Tariff is fixed at Rs.3.61/kWh at a CUF of 27.5%.
- xiv. In the light of the above, payment of tariff for the energy delivered beyond threshold CUF of 23% is not stipulated in the APERC order dated 15.11.2012.
- xv. It is not out of context to mention that in the cost plus methodology where generic tariff is determined for the RE projects by the Commission adopting certain threshold PLFs, the Fixed Cost is payable only for the energy delivered upto threshold PLF and beyond which nominal incentive is payable, as listed below:

Name of the RE Project	Threshold PLF	Incentive Payable	Commission order dated	Remarks
Biomass/	80%	35 paise/kWh	22.06.2013	For first 10 years of operation

Name of the RE Project	Thresho Id PLF	Incentive Payable	Commission order dated	Remarks
Industrial Waste		50 paise/kWh	19.07.2014	From 11 th to 20 th year of operation
Bagasse	55%	35 paise/kWh	22.06.2013	For first 10 years of operation
		50 paise/kWh	05.08.2014	From 11 th to 20 th year of operation
Mini Hydel	45%	35 paise/kWh	22.06.2013	For first 10 years of operation
		50 paise/kWh	23.08.2014	From 11 th to 20 th year of operation

- xvi. However, the then APERC order dated 15.11.2012 in respect of wind power projects, does not specify for any such payment of incentive for the energy generated beyond threshold CUF of 23%. Since the order has attained finality in so far as the petitioner did not contend the same, the terms & conditions of the order cannot be altered now.
- xvii. Besides, the contention of the petitioner is that since MNRE has accorded must-run status, the energy from their plant cannot be curtailed. It is to submit that there is no incidence of such curtailment and however, the respondents are always bound to do so in case of grid constraints.
- xviii. Further, the directions/letters addressed to APDISCOMs enlisted by the Petitioner are not related with the present petition.
- xix. In the light of submissions made above, the Commission is prayed to deny the prayer of the Petitioner for payment towards the energy generated beyond 23% CUF.

With regard to Issue-2, it is stated the following:

- i. While making payment to M/s Mytrah Vayu (Godavari) Private Limited, rebate is availed as per PPA anticipating that the payments will be released on due date. The internal approvals and Letter of Advice are generated availing rebate. Meanwhile for the months of May'16 to Dec'16 the payments were delayed.
- ii. However these bills were revised considering 23% CUF & Line losses and as per the revised calculations, it is found that the amount already paid for period Apr'16 to Mar'17 is more than the admissible amount. It is observed that an amount of Rs.5,77,40,515/- is paid in excess and was recovered on 10.01.2018. While recovering the amount, the excess

paid amount was adjusted without considering rebate. As such no rebate is availed by TSSPDCL for the billing months Apr'16 to Dec'16. The carrying cost for DISCOMs for advance payment of Energy charges above 23% CUF is yet to be setoff and there is no payment payable on account of rebate by TSSPDCL.

7. The petitioner has filed rejoinder to the counter affidavit and the contents of the same are extracted below:

- a. It is stated that the PPA's dated 26.03.2015 and 09.01.2017 were executed during the 2012 tariff regime introduced vide O.P.No.13 of 2012 dated 15.11.2012, wherein a firm tariff of Rs.4.70 was determined by the erstwhile Commission (APERC). During the course of the hearing of the erstwhile APERC in O.P.No.13 of 2012 dated 15.11.2012, in exercise of its powers conferred under Section 61(h), 62, 86(1)(a), 86(1)(b) and 86(1)(e) of the Act and in absence of its own tariff regulations for wind power projects, in line with the CERC (Terms and Conditions of Tariff Determination from Renewable Energy Sources) Regulations determined the preferential generic levelized tariff of Rs.4.70 per unit in the year 2012. The then APERC relied on the 2009 CERC Regulations in terms of the provisions of the National Tariff Policy (NTP). Further, considering the said tariff was computed on a levelized basis taking into consideration the useful life of the projects, it was provided that such tariff will remain fixed/constant for the useful life of the project.
- c. It is stated that the then APERC tariff order dated 15.11.2012 issued in O.P.No.13 of 2012 merely provide normative parameters for determination of the generic tariff. These parameters are not a project specific parameter and cannot be used to deny actual parameters. The relevant extracts of the 2012 Tariff Order are reproduced herein below:

“(vii) *Capacity Utilization Factor:*

[...]

The Commission after careful examination of written and oral submissions made by the stakeholders and NREDCAP, is of the view that only low-wind density sites are presently available in the state and hence higher hub-height machines have to be considered in the context of setting up of fresh capacity in the wind power sector.”

[...]

The Commission feels that with the advancement of technology, higher hub heights of 80 meters and above, larger rotor-diameter machines can

be installed and CUF of 23% should be achievable. Hence, the Commission considers that a CUF of 23% will be appropriate for the purpose of determination of generic tariff for all the wind power projects that are going to enter into PPA from the date of issuance of this order till 31-03-2015.

22. *Based on the above parameters and considering the useful life of a wind power plant as 25 years, the levelized preferential generic tariff for a 25-year period, works out to Rs.4.6995 per unit or say Rs.4.70 per unit. The Commission accordingly, considers it reasonable to fix the preferential levelized generic tariff in this order at Rs.4.70 per unit for all the units that will enter PPA between the date of this order and 31-03-2015.”*
- d. It is stated that it is evident from the above that, erstwhile APERC has encouraged to install Wind Turbine Generators (WTG's) of higher hub height of 80 Mts against 50 Mts in order to tap the wind potential thereby increasing the CUF's by 2-3% and has never assumed to restrict the CUF to 23% which is a mere normative assumption for determination of tariff.
- e. It is stated in response to the application, the respondent No.1 served its counter affidavit on 23.11.2021 denying claim of the petitioner on flimsy ground that the erstwhile APERC has taken the parameters into consideration for determination of preferential levelized generic tariff of Rs.4.70/unit for the wind power projects (that would enter PPA between 15.11.2012 and 31.03.2015 (As per APERC order dated 15.11.2012 issued in O.P. No.13 of 2021) clearly states that the Capacity Utilization Factor (CUF) of 23% has been considered for deciding the tariff therefore the same has considered as ceiling or the quantum of power to be accounted for. The petitioner analyzed the Counter Affidavit and stated that the grounds for non-payment in TSSPDCL Counter have no basis, are incorrect and made with the intention of misleading the Commission. It is stated that the stand of the respondent No.1 is contrary to the specific terms of the PPA and also against the established principles governing electricity sector.
- f. It is stated that the respondent No.1 is solely relying on misinterpretation of APERC order dated 15.11.2012 issued in O.P.No.13 of 2012 to submit that APERC order dated 15.11.2012 issued in O.P.No.13 of 2012 restrict respondent No.1 from making payment for any electricity delivered beyond 23% CUF. It is stated that the APERC tariff order dated 15.11.2012 issued in O.P.No.13 of 2012 merely provide normative parameters for determination of the generic tariff. These parameters are not a project specific parameter and cannot be used to deny actual parameters. Capacity Utilization Factor (CUF)

shall mean ratio of the actual energy produced by the Project in a year to the equivalent energy output at its rated capacity over the yearly period. APERC has specified norms based on standard conditions/parameters. However, CUF is technology specific norms and various factor for determination of CUF like air, density, wind speed, shear factor are site specific and denial of respondent No.1 to make payment to the petitioner for any electricity generated and delivered to the grid beyond 23% CUF is without any justification. It is stated that if the factors/norms given in APERC order dated 15.11.2012 issued in O.P.No.13 of 2012 are taken as a parameter for tariff payment to all generators than the respondent No.1 should also compensate generators if their projects are not able to meet parameters given in APERC order dated 15.11.2012 issued in O.P.No.13 of 2012, which is not the case.

- g. It is stated that this fact can be evident from comparison of tariff payment of two financial year that is 2016-17 & 2017-18 from the below given table, it is evident that for FY 2016-17 CUF was 25.32 % and DISCOMs have made payments only for 23% withholding the payments beyond 23% CUF. Similarly, for FY 2017-18, CUF was 22.28% and DISCOMs have released payments @ PPA Tariff for the energy delivered only, however, based on the so-called normative parameters of CUF @ 23%, the PPA tariff would have been increased to compensate for the revenue loss.

Name of the Project	PPA Capacity in MW	Power Export to the Grid in MW	Generation (FY 2016-17)	CUF (%) CUF = (Annual Generation)/(Power export to the grid in MWxNo. of Actual Operation hoursx1000)x100
M/s Mytrah Vayu (Godavari) Pvt. Ltd	100.8	100.3	21,15,62,450	25.32

Name of the Project	PPA Capacity in MW	Power Export to the Grid in MW	Generation (FY 2017-18)	CUF (%) CUF = (Annual Generation)/(Power export to the grid in MWxNo. of Actual Operation hoursx1000)x100
M/s Mytrah Vayu (Indravati) Pvt. Ltd	100.8	100.3	19,66,99,809	22.28

- h. It is stated that bare perusal of terms and condition of the terms of PPA will further reflect the arbitrariness and unlawful action of the respondent No.1. Terms of all PPAs are *pari materia*, for the purpose of submission, the Petitioner will quote paras from the PPA dated 26.03.2015 entered into between Southern Power Distribution Company of Telangana Limited and Mytrah Vayu (Godavari) Private Limited (Godavari PPA): Article 2 of the Godavari PPA records that the Respondent No.1 has agreed to procure all Delivered Energy at Rs.4.70/- per unit. Article 2 further records that title of the Delivered Energy will pass from the Petitioner to the respondent No.1.

“Article 2: Purchase of Delivered Energy and Tariff

- 2.1 *All the delivered energy at interconnection point for sale to DISCOM will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the project. Title to Delivered energy purchased shall pass from the Wind Power Producer to the DISCOM at the Interconnection point.*
- 2.2 *The Wind Power Producer shall be paid tariff for energy delivered at the interconnection point for sale to DISCOM, which shall be firm at Rs.4.70/- per unit for a period of 25 years from the Commercial Operation Date (COD) as per APERC order No.13/2012 dt. 15.11.2012.”*
- The term Delivered Energy has been defined in Godavari PPA at Article 1.5 as all electrical energy generated by the Project and delivered to the Respondent No.1 minus electrical energy consumed in the Project for its auxiliary consumption (i.e., for Project’s internal use like lighting and other loads of the Project).

Article 1.5 of Godavari PPA reads as below:

- “1.5 *Delivered Energy: means, with respect to any Billing Month, the kilo watt hours (kWh) of electrical energy generated by the Project and delivered to the DISCOM at the Interconnection Point as defined in Article 1.11, as measured by the energy meter at the Interconnection Point during that Billing Month.”*
- Explanation 1: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project, by the main plant and*

equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at Interconnection Point.

Explanation 2: The delivered energy in a Billing Month shall be limited to the energy calculated based on the Capacity agreed for export to network for sale to DISCOM as mentioned in Preamble and Schedule-1, multiplied with number of hours and fraction thereof the project is in operation during that billing month. In case any excess energy is delivered no payment shall be made for the same.”

- h. It is stated that the response submitted by the respondent No.1 in para 4 (iii) is in favour of the petitioner and has accepted that no payment shall be made to the energy delivered beyond the capacity agreed to which in the present case, the maximum energy that can be delivered for a capacity of 100.8 MW (Aux consumption 0.5 MW) is as follows:

*Delivered energy in a billing month shall be limited –
 $100.3 \times 720 \times 1000 = 7,22,16,000 \text{ kWh}$*

Any energy delivered more than 7,22,16,000 kWh shall not be paid in a billing month. The Petitioner has never claimed the tariff beyond 7,22,16,000 kWh in any billing month till date.

- i. It is stated that further, the tariff may have been determined by the erstwhile APERC considering various factors, however once the tariff was determined and the control period is defined, PPA's are the final contract between the generator and DISCOMs.
- j. It is stated that they further, invite reference to the secretary, MNRE, Government of India, wherein several times reiterated that Renewable Energy (RE) project are treated as "MUST RUN". The respondent No.1 in its submission at para (xvii) has accepted that, they are following the Must Run status accorded to RE projects which means that whatever the energy produced and delivered from the petitioner's project is being off taken and further supplied to its consumers. The respondents are blowing hot and cold by off taking the energy delivered and not paying the tariff as per the terms of the PPA.
- k. It is stated that, MNRE has by way of office memorandum dated 01.04.2020 & 04.04.2020 clarified that the 'Must Run' status of RE Generating Stations remains unchanged during the period of lockdown and payments to RE generators should be made on a regular basis as was being done prior to lockdown (MNRE OM). Further, MoP vide its notification dated 22.10.2021

issued Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021. The relevant extracts are as follows:

“3. *Must-run power plant –*

(1) *A wind, solar, wind-solar hybrid or hydro power plant (in case of excess water leading to spillage) or a power plant from any other sources, as may be notified by the Appropriate Government, which has entered into an agreement to sell the electricity to any person, shall be treated as a must-run power plant.*

(2) *A must-run power plant shall not be subjected to curtailment or regulation of generation or supply of electricity on account of merit order dispatch or any other commercial consideration:*

Provided that electricity generated from a must-run power plant may be curtailed or regulated in the event of any technical constraint in the electricity grid or for reasons of security of the electricity grid:

Provided further that for curtailment or regulation of power, the provisions of the Indian Electricity Grid Code shall be followed”.

- I. It is stated that in view of the above, petitioner states to release the payments deducted towards CUF against the generation bills along the late payment surcharge for the period FY 17 to FY 21 immediately and not to deduct if any for FY 22 and future.

Schedule I of Godavari PPA and Recital of Godavari PPA specifically records that out of 100.8 MW generated by the Project 0.5 MW is for auxiliary consumption and 100.3 MW is for auxiliary consumption. Recital and Schedule-I of PPA reads as below:

“2. *WHEREAS, the Wind Power Producer is setting up the New and Renewable Energy Project i.e., 100.8 MW (48x2.1 MW) capacity Wind power project at Nazeerabad (V) Parigi Mandal, Ranga Reddy District, Telangana (hereafter called the Project,) with a proposal of 0.50 MW for Auxiliary Consumption and 100.3 MW for export to grid for Sale to DISCOM as detailed in Schedule 1 attached herewith, and Telangana New and Renewable Energy Development Corporation of Telangana Limited hereafter referred to as M/s TNREDCL has accorded approval to the said project in their Proceedings No.TNREDCL/WE/Mytrah/ 6963/2015, dated: 09.02.2015 and the wind power producer has entered into an agreement with TNREDCL on 19th of February, 2015 the copies whereof are attached herewith as Schedule II and Schedule III respectively. Later on, TNREDCL has sanctioned additional capacity allotment of 0.8 MW in proceeding No.TNREDCL/WE/Mytrah/6963/2015, dated: 06.01.2016 for generation of electric power on commercial basis to match with the aggregate machine capacity and the wind power producer has entered into an agreement with TNREDCL on 06th of January, 2016 the copies whereof are attached as Schedule V and Schedule VI respectively. Further, TNREDCL vide letter No.TNREDCL/WE/Mytrah/6963/2016, dated 24.10.2016 copy attached as Schedule-VII clarified that both the proceedings dated 09.02.2015 and*

06.01.2016 pertaining to the same project consolidating to 100.8 MW (48x2.1 MW).”

Name of the Project	Location	No.of Units	Capacity of each Unit	Installed Capacity of the Project	Power Export to the Grid*
M/s Mytrah Vayu (Godavari) Pvt. Ltd	Nazeerabad (V), Parigi (M), Ranga Reddy District, Telangana	48 Nos	2.1 MW	100.8 MW	100.3 MW

* Out of 100.8 MW, 0.50 MW is for Auxiliary Consumption and 100.3 MW is for export to grid for sale to DISCOM.

- m. It is stated that conjoint reading of afore-quoted paras from the PPA reflect the Parties have agreed that the respondent No.1 will purchase all energy which has been delivered for sale to respondent No.1 and title to the energy will pass post-delivery of the energy. PPA specifically records that all generated energy will not be considered as the delivered energy and those energy which will be consumed by the project for its own consumption will be excluded from the definition of the “*Delivered Energy*”.
- n. It is stated that PPA further records that the delivered energy will be limited to the energy calculated based on the capacity agreed for export to the network for sale to DISCOMs as mentioned in Preamble and Schedule-1. (Explanation 2 of Definition Clause 1.5). Recital 1 of PPA further records the agreed capacity. It is respectfully submitted that it is a matter of record that the Petitioner is raising invoice in strict compliance of the terms of PPA and it has also not been alleged by the respondent No.1 that the Petitioner has increased its capacity which is specifically prohibited under PPA.
- o. It is stated that the petitioner in terms of the PPA have supplied all the delivered electricity and have raised invoices till date. It is a matter of record that the respondent No.1 has never raised dispute on the invoice and have been accepting such invoices which have been prepared reflecting units recorded in terms of the PPA. The respondent No.1 for reasons best known to it raising this issue.
- p. It is stated that Section 70 of the Indian Contract Act, 1872 specifically deals with the obligation of person enjoying benefit of non-gratuitous act and the same is iterated as follows: “*Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or*

delivered'. In the circumstances based on the above principle, as the energy delivered by the petitioner from its wind power project to the grid has been utilized by the 1st respondent. The Respondent No.1 has procured all electricity generated by the Petitioner and has also distributed such electricity to its consumer for a lawful consideration. It will be unjust on the part of the respondent No.1 to deny the legitimate claim of the petitioner for the benefit it availed from supply of the electricity by the petitioner.

- q. It is stated that the table given by the respondents regarding the CUF & tariffs determined is not relevant since the petitioner's project doesn't fall in the applicable period and also technical parameters vary from state to state which was observed by erstwhile APERC in issuance of tariff order dated 15.11.2021 in O.P.No.13 of 2012.
- r. It is stated that the table given by the respondents regarding the incentives payable to various RE projects like biomass, and bagasse are not relevant as those projects are having two-part tariff and in the instant case the petitioners project is being paid on the single part tariff.
- s. It is stated that submission of respondent is in favour of the petitioner that erstwhile APERC has not specified any such payment of incentive for the energy generated beyond the threshold CUF of 23% because they have never restricted the energy payment for the energy delivered beyond 23% CUF.
- t. It is stated that petitioners are eligible for claiming rebate amounts deducted by respondent No.1 as per the PPA terms and at this point of time it is not correct in saying that, due to internal approvals and letter of advice are generated availing rebate and meanwhile for the months of May'16 to Dec'16 the payments were delayed, which is not justifiable.
- u. It is stated that as per the PPA terms there is no such Clause stating the payments should be restricted for the energy generated beyond 23% CUF and therefore the carrying cost for DISCOMs for advance payment of energy charges above 23% CUF is yet to be setoff and the contention that no payment payable on account of rebate by TSSPDCL is not justifiable.
- w. It is stated that without prejudice to the above contentions, the very Commission vide its order dated 06.10.2018, while determining the generic tariff for wind power plants in Telangana State for the period between 2018-2020, based on National Institute of Wind Energy (NIWE), Chennai readings, a CUF of 27.5%

can be achieved by Wind Power Project in the State of Telangana and the commission has also considered the same for determining generic wind power tariff. So the present action of the respondents in curtailing the CUF at 23% is totally arbitrary and illegal.

- x. It is stated that all the averments made in the counter affidavit under reply are not relevant to the reliefs prayed for, that is to direct the respondents to make payments for all energy delivered to it by the petitioner as per agreed PPA.
 - y. It is stated that therefore prayed the Commission to grant the reliefs prayed for by the petitioner in the present petition.
8. The respondents have filed additional submissions, which are extracted below.
- a. It is stated that in the first place, the petitioner indisputably agrees to the fact that the PPA was executed based on APERC tariff order of 2012, wherein fixed levelized tariff at the rate of Rs.4.70/unit was determined for purchase of energy from the wind power projects for which agreements were to be concluded from 15.11.2012 till 31.03.2015.
 - b. It is stated that admitted by the petitioner that while determining such generic tariff, the Commission among other parameters has taken into consideration CUF at the rate of 23%. As satted by the petitioner, it is incorrect to say that the tariff order of 2012 merely provides normative parameters for determination of the generic tariff and these parameters are not project specific parameter, which cannot be used to deny actual parameters. When the tariff is arrived based on certain parameters, the petitioner at his convenience, after a period of 9 years from the tariff order, cannot now state that the tariff order is to be considered in parts.
 - c. It is stated that the tariff order of 2012, which is the basis for execution of PPA shall be read in its entirety and not in piecemeal as per the convenience of the petitioner and cannot be implemented in parts. When the tariff at the rate of Rs.4.70/per kWh is acceptable, the other incidental parameters based on which the tariff is arrived, such as CUF at the rate of 23% cannot be denied. Had that been the case, the petitioner, before signing of the PPA itself, could have challenged the same.
 - d. It is stated that the petitioner is in a misconception that higher hub heights have resulted in 2-3% improvement in CUFs and hence cannot be restricted. The

petitioner cannot deny the fact that had the Commission considered higher CUF than 23%, the tariff would arithmetically have been lower than Rs.4.70/kWh. As such the tariff and CUF being inversely proportional and benefitting the developer with higher CUFs should be reflected in reducing the tariff.

- e. It is stated that the grounds for restriction of payment of tariff to the energy supplied by the developer's project to the approved CUF at the rate of 23% are neither flimsy nor contrary to the terms and conditions of the PPA in general and the Commission's order dated 15.11.2012 in specific. Acceptably, the Commission's order dated 15.11.2012 is a generic tariff order and not an order determined for a specific project. As such, the entire operational and financial parameters, based on which the tariffs determined are uniformly applicable to all the wind projects which enter into PPA in the specified period.
- f. It is stated that when the developer is raising concern over compensating for not meeting the parameters such as not maintaining normative CUFs, the DISCOMs have equal right to be compensated for the under generation by the project. This is so because the DISCOM design the power purchase procurement plan based on the generation estimates which in turn are calculated on CUF parameters of respective tariff order. As such, when the developer project runs below the threshold CUF, the DISCOM is forced to depend on the volatile market for purchase of power to meet the power demand. In fact, the DISCOMs have to spend extra money for purchasing comparatively expensive power from the open market to compensate the under generation by the developer.
- g. It is stated that since, the tariff order being generic in nature, specific financial parameters such as capital expenditure, O and M expenses, rate of interests etc., of the individual projects shall not be brought into picture and hence the developer is not permitted to demand for compensation of revenue loss on account of not achieving normative CUF. The tariff order passed by the Commission takes into consideration certain operational and financial parameters based on which the tariff is determined. As such, when the tariff is accepted the associated parameters too shall be accepted and cannot be denied.
- h. It is stated that in the counter affidavit filed by the respondents, the petitioner cannot cherry pick articles of the PPA and pray for payment of bills at a tariff of

Rs.4.70/unit for the units delivered beyond 23% CUF. The Article 2.2 shall be read in conjunction with Article 1.5 which stipulates that no payment shall be made to the energy delivered beyond the capacity agreed to. Further, the genesis of contract (PPA) between the parties being the then APERC tariff order of 2012, the operation of terms and conditions of the PPA are governed by the APERC tariff order of 2012.

- i. It is stated that the 'must run' status of the developer's project is never denied by the respondents and the energy from the plant is never curtailed. However, under the grid code regulations, the respondents are always bound to pass necessary instructions in case of grid constraints. Ironically, the table in the counter filed by the respondents is showing the tariffs determined by various Commissions against the CUFs adopted also proves the fact that higher the CUFs lesser are the tariffs.
- j. It is stated that the purpose of illustrating the Commission orders for other NCE projects indicating the incentive allowed instead of full tariff, is to establish the fact that beyond the threshold PLF/CUF, the developers are not entitled for payment of energy at determined tariff. It shows the ignorance of the developer to state that their project is paid single part tariff. The natural fuel based projects such as solar, wind and mini hydel are paid single part fixed cost tariff only since the variable cost associated with fuel is nil. In case of biomass / bagasse / industrial waste based projects which are paid two part tariff, fixed and variable cost. The fixed cost is not paid for the energy delivered beyond threshold PLF and only certain incentive is paid. However, with respect to developer's wind power project even the payment of certain incentive for the energy generated beyond the threshold CUF of 23% is not justified, since the tariff of Rs.4.70/unit determined by the Commission recovers all the expenses/costs of the developer. Further, even the subsequent tariff order dated 06.10.2018 passed by the Commission also did not grant any kind of incentive for the energy delivered beyond the threshold CUF.
- k. It is stated that since the APERC tariff order of 2012 in respect of wind power projects does not specify for any such payment of incentive for the energy generated beyond threshold CUF of 23% and since the order had attained finality, the petitioner did not contest the same, the terms and conditions of the order cannot be altered now.

- I. It is stated that it is incorrect on the part of the petitioner to state that it is unjust on part of respondents to deny legitimate claim of the petitioner for the benefit availed from supply of the electricity by the developer. The respondents are bound by the terms and conditions of the PPA. The tariff order of 2012 which is part of the PPA invariably specifies for payment of the energy delivered upto threshold CUF of 23% and is adhered by the respondents. Since the order does not grant any incentive for the tariff delivered beyond threshold CUF of 23%, the petitioner's claim for such additional energy is not legitimate.

9. The respondents have filed written submissions as extracted below:
 - a. It is stated that the petitioner filed the present petition before the Commission seeking directions for payment towards the energy delivered beyond 23% CUF.
 - b. It is stated that the subject petition came up for hearing on 31.01.2022. The petitioner advocate submitted their arguments duly referring to gist of dates and events in the matter and extensively put forth various Clauses of Act, 2003, Regulations and the PPA, which could be summarized as below:
 - i. The petitioner tried to establish that the parameters adopted in the said order are indicative only; as such DISCOM cannot cut short payment for the energy delivered beyond 23 % CUF;
 - ii. Referred to the grid code which grants MUST RUN status for the Wind power projects;
 - iii. Referred to NREDCAP agreement with the petitioner which suggests for higher hub heights for better CUF efficiency;
 - iv. Referred to para 23 (iv) of Commission order dated 15.11.2012 wherein it was inter-alia stated that, "Wind power generators will be entitled to dispatch 100% of the available capacity without reference to the merit order dispatch, subject however, to system constraints";
 - v. Referred to Section 61 (1) (e) of the Act, 2003 which mentions for the appropriate Commission to specify the terms and conditions for determination of tariff to be guided by, among others, the principles rewarding efficiency in performance;
 - vi. Referred to other state commission orders which allow purchase of power beyond threshold CUF;

- c. In response to the arguments put forth by the petitioner, the respondents submit the following written submissions:
- i. Having accepted the Commission order dated 15.11.2012 by not challenging it, the petitioner is not permitted to state that the parameters adopted for determination of tariff in the said order are only indicative.
 - ii. When the tariff determined is specific, not indicative, it is not appropriate to state that the parameters, basing on which the tariff is determined, are indicative.
 - iii. Further, the energy delivered by the petitioner's project to the DISCOM is being purchased at the tariff determined by the Commission in the said generic order. Needless to submit that any alteration in the parameters would reflect in the tariff and may even result in reduction in tariff.
 - iv. Alternatively, when the parameters are allowed to vary then so does the tariff. The CUF and tariff being inversely proportional, the improved CUFs (as claimed by the Petitioner) should be reflected in the per unit tariff and the benefit of such decreased tariff shall be passed on to the DISCOM.
 - v. The respondents are bound by the tariff order of the Commission and as such honouring the PPA and tariff order, which specifies for 23% CUF, are making payments for the energy delivered upto threshold CUF.
 - vi. The MUST RUN status accorded to wind power project of the petitioner is never disputed and thus the energy from their project is not subjected to merit order despatch.
 - vii. Both PPA and tariff order, to which both the petitioner and respondent DISCOM are parties, have clear provisions with regard to tariff, CUF and payment. Had the intention of tariff order been to extend tariff to the energy generated/supplied beyond the threshold CUF, there shall have been a mention/provision in the tariff order to that extent.
 - viii. It is inappropriate to refer to the NREDCAP agreement which inter-alia states for achieving higher CUFs for better CUF efficiency.
 - ix. The agreement signed by the petitioner with NREDCAP is approval accorded by the agency for establishment of Wind power project. However, it is the PPA dated 26.03.2015 along with the Commission tariff order dated 15.11.2012, which govern the energy transactions

between the petitioner and the DISCOM and the agreement signed by with NREDCAP is a pre-requisite and has no role to play further in the matter of sale of energy by the developer to DISCOM.

- x. The para 23(iv) of Commission order dated 15.11.2012 referred by the Petitioner. The para 23 is extracted below for better understanding –

“

23. *The above preferential generic levelized tariff determination is subject to the following terms and conditions:*

- i. The preferential generic levelized tariff fixed in para 22 above shall be operative for a period of twenty five (25) years from the Commercial Operation Date (COD).*
- ii. The DISCOMs shall have the first right of refusal on Power Purchase, if the Plant continues to operate after the 25th year of operation from the COD. The tariff beyond 25th year shall be as mutually agreed by both the parties and consented by the Commission.*
- iii. The Wind Power generators shall bear the entire cost of power evacuation upto the Grid Substation.*
- iv. Wind power generators will be entitled to dispatch 100% of the available capacity without reference to the Merit Order Dispatch, subject however, to any system constraints.*

... ..”

- xi. As such, the Commission while issuing generic tariff for the wind power projects, mentioning CUF and other parameters, directed that these wind power projects shall not be subjected to merit order despatch except in case of system constraints. However, these directions are misinterpreted by the petitioner for payment of tariff for 100% delivered energy.
- xii. The Sections referred by the petitioner as such 61(1)(e) and others are general in nature which illustrates various responsibilities of the Commission and limitations within which Commission needs to operate.
- xiii. Nevertheless, the PPA signed between the petitioner and the DISCOM is the binding factor and the energy transaction is governed by the terms and conditions of the agreement (which in turn emerged from the generic tariff order of the Commission dated 15.11.2012).
- xiv. As such, the tariff determined by the Commission in the said generic tariff order and the parameters based on which the tariff is determined is more specifically binding between the parties, viz, petitioner and the DISCOM.

- xv. The other State Commission orders referred are not relevant for the present case.
- d. It is stated that in the light of the above, it is prayed that the Commission to take all the submissions and additional submissions of the respondents into consideration and deny the prayers of the petitioner.
10. The Commission has heard the parties and also considered the material available to it. The submissions on various dates are noticed below, which are extracted for ready reference.

Record of proceedings dated 08.11.2021:

“... .. The advocate representing the counsel for petitioner stated that the matter is coming up for the first time. The representative of the respondents stated that he needs three weeks time for filing counter affidavit in the petition and application. Considering the request of the respondents, the matter is adjourned with a direction to file counter affidavit on or before the date of hearing duly serving a copy of the same to the petitioner through email or in physical form. The counsel for petitioner may file rejoinder, if any, on or before the date of hearing duly serving a copy of the same to the respondents through email or in physical form.”

Record of proceedings dated 20.12.2021:

“... .. The counsel for petitioner stated that he needs further time to file rejoinder in the matter. Accordingly, the matter may be adjourned to any other date. The Commission directs the counsel for petitioner that the rejoinder shall invariably be filed by the next date of hearing duly serving the same to the respondents through email or in physical form. Accordingly, the matter is adjourned.”

Record of proceedings dated 03.01.2022:

“... .. The counsel for petitioner stated that the reply to the counter affidavit has been filed. The representative of the respondents stated that they are yet to receive the same. As such, the same has been made available by the office of the Commission today. Therefore, the matter may be adjourned. Accordingly, the matter is adjourned.”

Record of proceedings dated 31.01.2022:

“... .. The counsel for petitioner stated that the petition is filed for reimbursement of the amounts payable towards generation and supply of electricity over above the capacity utilization factor as set out by the Commission in its order dated 15.11.2012. It is stated that the petitioner is a 100.8 MW wind power project and had entered into PPA in the year 2015 in terms of the order of the Commission. In the year 2016-17 and subsequently, it had exceeded the CUF normative as fixed by the Commission and delivered quantum of energy. The licensee is making payments only to the extent of CUF and deducting the amounts towards excess generation even though claim is made by the petitioner.

The counsel for petitioner stated that he has preferred gist of dates and events in the matter and shared the same with the Commission as a presentation during the course of hearing. He also stated that the same will be filed before

the Commission subsequently. He has referred to extensively as also the relevant clauses in the Electricity Act, 2003, regulations and the power purchase agreement in support of the case of the petitioner. He has stated that the licensee has been withholding the amount payable to it for the last four years in respect of the generation supplied to them in excess of CUF. He also stated about the amounts due and quantified it at Rs.78 crores.

The counsel for petitioner stated that the licensee is not giving effect to the orders of the Commission, as the order of the Commission is specific and clear that it should pay for all the energy delivered to it. It is also his case that it is an infirm power, as such the licensee cannot insist that the generator should adhere to the CUF and it should be taken only as a normative. The CERC had been stating that the CUF will vary according to the wind zone as also the hub height of the generator. The petitioner had employed better technology and as such, he is achieving better CUF.

The representative of the respondents stated that he is not in receipt of the dates and events statement as also he needs further time to make submissions in the matter. Therefore, the matter may be adjourned to enable receipt of the statement of dates and events and also to make submissions in the matter. In view of the request made by the representative of the respondents, the matter is adjourned.”

Record of proceedings dated 11.04.2022:

“... .. The counsel for petitioner stated that the factual matrix involved in this matter. The petition is filed with reference to payments being effected by the licensee towards power supply contrary to the provisions of the PPA. He has referred to the provisions in the PPA, the order passed by the erstwhile APERC and the judgment rendered by the Hon’ble Supreme Court. He has explained the provisions of the PPA with regard to capacity, capacity utilization factor and payment of tariff based on the order of the APERC. He sought to interpret the provisions of the PPA, observations made by the APERC while determining the preferential tariff and the factors considered for arriving at CUF. It is his case that the factors that went into arriving at tariff and CUF were based on the directions given by the Hon’ble ATE and the Commission had not deviated from the same. While determining the tariff, the Commission ensured levelization of the tariff across the life of the project.

The main concern of the petitioner is supply of energy generated within the CUF and payment for the same by the licensee. The CUF has been averaged bring in parity between different zones, which have different CUF based on geographical location. The tariff has been worked out based on such levelized CUF. It has no reference to capacity of the project, which was initially 100 MW at the time of signing the PPA and it was subsequently amended to 100.8 MW in the year 2017. The licensee initially understood the provision properly and paid for the energy delivered, wherein the petitioner made the CUF. However, subsequently the licensee started interpreting the CUF by linking the same to the capacity. By no means, the petitioner will be able to deliver more than the capacity of the plant and for any reason, if it is delivered also, the energy so delivered does not get paid for as the capacity has already been agreed to by the parties. Inasmuch as, the petitioner is not demanding payment for the energy supplied to the licensee over and above the CUF, but it is entitled to such charges, which are allowed under the PPA.

The counsel for petitioner stated that the licensee is not giving effect to the orders of the Commission, as the order of the Commission is specific and clear that it should pay for all the energy delivered to it. It is also his case that it is an infirm power, as such the licensee cannot insist that the generator should adhere to the CUF and it should be taken only as a normative. The CERC had been stating that the CUF will vary according to the wind zone as also the hub height of the generator. The petitioner had employed better technology and as such, he is achieving better CUF.

The representative of the respondents stated that the respondents are also relying on the same provisions as have been addressed by the petitioner to claim relief. The licensee is bound to follow the terms of the PPA and cannot deviate from the same. The licensee made payments towards the energy delivered in terms of the PPA only keeping in mind the parameters set out by the Commission and the levelized tariff fixed thereof relying on average CUF. The PPA is based on the decision of the Commission only as it was established within the period for which the order of the Commission is made applicable. The petitioner could not have delivered more energy than the normative fixed by the Commission and also cannot claim the charges for excess energy delivered over and above the CUF, which is benchmark for payment. The petitioner is attempting to claim additional benefit despite the order of the Commission being clear as to CUF, which has to be considered for payment and not capacity as has been defined in the PPA.

The representative of the respondents would emphasize that the PPA is binding on both the parties. The order of the Commission clearly demonstrated and considered the CUF of various places including various zones in the then combined state and levelized the same for arriving at tariff. The tariff fixed by the Commission is dependent on the parameters relied and upon based on the observations of the Hon'ble ATE. The petitioner is not entitled to any relief as prayed for as the licensee has complied with the orders of the Commission and the provisions of the PPA. The petitioner is well aware of the fact that it cannot get paid for energy delivered over and above the CUF."

11. The issue that arises for consideration is whether the petitioner is entitled to the relief as prayed for or any other relief in the circumstances of the case.

12. Prima facie having signed the agreement for sale and procurement of the power the parties are not at consensus *ad idem* on the interpretation of the provision made thereof. The whole issue boils down to the main aspect of quantum of energy to be taken into account keeping in mind the normative CUF that has been fixed by the Commission. However, at the same time, it is paramount that the parties are not lost in the din of any interpretation rendered to the Clauses set out in the PPA. Inasmuch as the issue raised needs resolution within the four corners of the agreement, for which the same has to be read as whole and not as pieces, which is the settled principle of law.

13. At the outset, it must be stated what the order of the Commission may be the understanding that has set out the agreement given the primacy with regard to the rights and obligations *interse* between them. Even now the parties have to be shown as to how to interpret the provisions in the agreement. The main provisions in the agreement relating to delivery of energy as also the drawl of the same is governed by the provisions relating to the definition Clause and the tariff payment Clause. The petitioner relied on the Clause 2.1 read with Clause 1.5 of the agreement. The respondents take umbrage under the order of the Commission. The agreement is specific and identifies the quantum of energy to be taken by the respondent at the interconnection point. The Clauses in the agreement have to be given effect to coupled with the subsisting orders of the Commission.

14. Before advertng to the rival contentions, the Commission would place on record its view on the maintainability of a petition against TSPCC. The said committee is constituted mainly for coordination between the distribution licenses and has not been constituted exercising any statutory power under the Act, 2003 or any other law. Therefore, it is neither a statutory body nor has any authority to be treated as such. it is only an administrative committee exercising such functions as have been assigned to it by the government. Accordingly, it cannot be treated as a local authority under the Constitution of India. In the circumstances no direction can be given to the said committee.

15. The definition used in the agreement with regard to delivered energy captures the quantum of energy that is pumped into the system at the interconnection point, and it is explained as capacity agreed between the parties. The capacity in this case is identified in the schedule to the agreement. The petitioner is expected to deliver energy to the respondents to the extent of the capacity. But should have achieved a 23% CUF normative fixed by the Commission in its order. Therefore, the respondents are not inclined to take any energy over and above the said capacity.

16. It has to be stated here that the petitioner project is a renewable source and will be available only at times and not continuously. Though there are specific timelines in which period the generation is available yet wind generation cannot be said to be a firm generation. As such it is designated as a must run station. Moreover, the CUF has been fixed as a normative and not as affirmative. In the case of must run station no

distinction can be made or limitation can be imposed with CUF.

17. The petitioner is claiming that the excess energy generated has been injected into the grid and seeks payment for the same. As seen from the information placed on record, there are variations in the energy injected into the grid. This happened either in excess or less in two financial years. The main grievance of the petitioner is accepting the excess energy which is more than normative CUF at times and should be paid for at the tariff determined by the Commission. The same is opposed by the respondent. The contention of the respondent appears to be on the basis of the order of the Commission, at the same time the order of the Commission as well as the Clauses in the agreement have to be read harmoniously.

18. The claim of the petitioner as it relates to, not only accepting the excess capacity injected into the grid but also pay for the same. The tariff sought by the petitioner for the excess generation at the same tariff that is payable up to the CUF, this aspect is contested by the respondent. It is the case of the respondent that the tariff is payable only up to the CUF and not beyond the same even though energy is generated and injected into the grid. This contention stems from the fact that Commission did not allow any incentive for the excess generation over and above the normative CUF. It is also its case that unlike other renewable sources wind generation is not incentivised. Therefore, the issue remains and hinges solely on the CUF and the tariff allowed by the Commission. While it is true that the Commission is required to consider the case of the petitioner, however it should be with reference to the order passed by it.

19. Several contentions have been raised on either side by the parties and reliance is placed on the orders of the Hon'ble ATE as well as Hon'ble Supreme Court. Suffice it to state that the orders are contextually correct but does not require consideration in this matter. Also, Section 70 of Indian Contract Act is referred to, the dispute between the parties have to be looked into solely on the basis of the provisions in the order passed by the Commission and the agreement entered by the parties.

20. The Commission had determined generic tariff for wind based generating plants by considering a normative CUF of 23%, but at the same time it is also imperative that the Article 2.1 of the agreement which says that all the delivered energy at the

interconnection point will be purchased at the tariff provided for in Article 2.2 in conjunction of Article 1.5 which stipulates that no payment shall be made to the energy delivered beyond the capacity agreed to, also be given effect to. The parties at first instance, if they had any difficulty in giving effect to the provisions in the order and the agreement entered by them, ought to have approached this Commission to iron out the differences between the order of the Commission as also the provisions in the agreement. Alas after implementing the agreement for about six (6) years, the issue is brought before the Commission with regard to interpretations and understanding by the parties.

21. It is trite to state that the agreement is sacrosanct between the parties. Having said that it is absolutely not correct to state that the parties have acted contrary to the said agreement. Each of the parties have acted in terms of their understanding. As such the present proceedings before the Commission have been initiated.

22. Further, the petitioner has several contentions with regard to must run status and directions issued by MoP, MNRE of GoI and GoAP. Neither they are relevant nor applicable when the agreement is in place which governs the rights and obligations of the parties. At the most the GoI clarification or observation act as guidance but cannot be factored in deciding the matter. Also, the directions referred to from GoAP are with that state DISCOMs and the same are not binding on the Commission or the DISCOMs in the Telangana State. Therefore, the same are not considered.

23. Reference has been made to other State orders on tariff. It is neither relevant nor appropriate as the case on hand is with respect to specific condition which is based on the specific parameter adopted by the Commission. Either way as stated above the order of the Commission has to be given effect to but by harmoniously reading understanding reached by the parties.

24. The Commission passed order dated 15.11.2012 in O.P.No.13 of 2012 through public consultation process duly considering all the comments/suggestions of the stakeholders and determined the generic levelised tariff @ Rs.4.70 per unit for the wind based generating plants that enter into PPA between 15.11.2012 and 31.03.2015 for a period of 25 years by factoring normative CUF of 23% in order to encourage efficiency and optimal selection of sites and also considered factors like advancement

of technology, higher hub heights and larger rotor diameter machines. It is known fact that the generic levelised tariff and CUF are inversely proportional and for higher CUF the generic levelized tariff would be lower than the determined tariff for entire period of 25 years. The wind based power projects use wind i.e., renewable source and as such incur no variable cost associated with it. Hence, the prayer of the petitioner is not tenable.

25. Now turning to the other prayer relating to retaining the rebate which was deducted by the licensee, it is noticed from the record the licensee has stated that excess payment has already been made and as such no payment is liable on part of it. This fact is not denied by the petitioner clearly by way demonstrating the calculation if any. In the absence of the same, no relief can be granted on this count.

26. In view of the observations and conclusions arrived at, the petition is dismissed but without any costs.

27. The Commission has decided the main case itself and as such there is no necessity to decide the interlocutory application accordingly the same stands closed.

This order is corrected and signed on this the 21st day of November, 2022.

Sd/-
(BANDARU KRISHNAIAH)
MEMBER

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

Sd/-
(T. SRIRANGA RAO)
CHAIRMAN

//CERTIFIED COPY//