



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4thFloor, Singareni Bhavan, Red Hills, Hyderabad 500004

WEDNESDAY, THE TWENTIETH DAY OF DECEMBER,
TWO THOUSAND AND TWENTY THREE

:Present:

Justice C.V. Nagarjuna Reddy, Chairman

Sri Thakur Rama Singh, Member

Sri P.V.R.Reddy, Member

OP Nos.3, 13, 32 & 33 of 2023

OP No. 3 of 2023

Between:

VishWind Infrastructure LLP,
Through its Authorised Representative,
Fortune Terraces, 11th Floor, A-Wing,
Plot C.T.S. No. 657 & 658, New Link Road,
Andheri (West), Mumbai, Maharashtra-400053

...Petitioner

And:

1. Southern Power Distribution Company of Andhra Pradesh Limited
Through its Chairman & Managing Director,
D. No.19-13-65/A, Srinivasapuram,
Tiruchanoor Road, Tirupati,
Chittoor District, Andhra Pradesh-517503
2. Transmission Corporation of Andhra Pradesh Limited,
Through its Chairman & Managing Director,
Vidyut Soudha, Gunadala, Eluru Road,
Vijayawada, Andhra Pradesh- 520004
3. Andhra Pradesh Power Coordination Committee,
Through its Chief General Manager,
Vidyut Soudha, Vijayawada, Andhra Pradesh- 520004

...Respondents

OP No. 13 of 2023

Between:

Vaayu (India) Power Corporation Pvt. Ltd.
Through its Authorised Representative,
Commercial Complex, H-Block, Alpha-II Sector,
Greater Noida, Uttar Pradesh-201308 .

...Petitioner

And:

1. Southern Power Distribution Company of Andhra Pradesh Limited,
Through its Chairman & Managing Director, D. No.19-13-65/A,
Srinivasapuram, Tiruchanoor Road, Tirupati, Chittoor District,
Andhra Pradesh-517503
2. Transmission Corporation of Andhra Pradesh Limited,
Through its Chairman & Managing Director,
Vidyut Soudha, Gunadala, Eluru Road,
Vijayawada, Andhra Pradesh- 520004
3. Andhra Pradesh Power Coordination Committee,
Through its Chief General Manager,
Vidyut Soudha, Vijayawada, Andhra Pradesh- 520004.

...Respondents

OP No. 32 of 2023

Between:

Southern Power Distribution Company of Andhra Pradesh Limited,
Through its Chairman & Managing Director, D. No.19-13-65/A,
Srinivasapuram, Tiruchanoor Road, Tirupati, Chittoor District,
Andhra Pradesh-517503

...Petitioner.

And:

Vaayu (India) Power Corporation Pvt. Ltd.
Through its Authorised Representative,
Commercial Complex, H-Block,
Alpha-II Sector, Greater Noida,
Uttar Pradesh-201308 .

..Respondent

OP No. 33 of 2023

Between:

Southern Power Distribution Company of Andhra Pradesh Limited
Through its Chairman & Managing Director,
D. No. 19-13-65/A, Srinivasapuram, Tiruchanoor Road,
Tirupati, Chittoor District, Andhra Pradesh-517503.

...Petitioners

And:

VishWind Infrastructure LLP
Through its Authorised Representative,
Fortune Terraces, 11th Floor A-Wing,
Plot C.T.S. No. 657&658 New Link Road,
Andheri (West), Mumbai, Maharashtra-400053

..Respondent

These Petitions have come up for final hearing before us 04-11-2023, in the camp Court Visakhapatnam, in the presence of Sri Sohael Buttan, counsel representing Sri Sree Venkatesh, learned counsel for the petitioners in OP Nos.3 and 13 of 2023 and respondents in OP Nos.32 and 33 of 2023; and Sri P.Shiva Rao, learned Standing for the respondents in OP Nos.3 and 13 of 2023 and the APSPDCL-petitioner in OP Nos.32 and 33 of 2023, that after hearing the learned counsel for both the parties, and on consideration of the entire material on record, the Commission passed the following:

COMMON ORDER

Original Petition Nos.3 and 13 of 2023 have been filed by M/s.Vish Wind Infrastructure and M/s.Vayu (India) Power Corporation Private Limited, respectively, (Petitioners) seeking a direction to APSPDCL (DISCOM) to grant “No objection Certificates” to sell the power generated by them through “Open Access”; whereas OP Nos.32 and 33 of 2023 have been filed by the “DISCOM, seeking a declaration that the

termination of the PPAs, in the mid-course, by the petitioners, is illegal, arbitrary and invalid. As the issues involved in these Petitions are interconnected, they are being disposed of by this Common Order.

Both the petitioners are the Wind Power Generating Companies. Petitioner in OP No.3 of 2023 has developed the Wind Power Project of the total Capacity of 7.2 MW, in a phased manner - (Pases II, III, IV) - in Kurnool District, whereas the petitioner in OP No.3 of 23 has set up the Wind Power Project of the total Capacity of 50.4 MW - in Phases-I to VII - at Kondameedi Palli village in Kurnool District of Andhra Pradesh. Both the petitioners have entered into the following Power Purchase Agreements with the DISCOM on various dates, which were approved by this Commission:

PPAs in OP No.3 of 2023:

Sl.No.	Phase	CAPACITY	PPA Date	COD	Expiry date
1	Phase II	4 MW	30.10.2010	14-10-2010	13-10-2030
2	Phase III	1.6 MW	30.10.2010	31-03-2011	30-03-2031
3	Phase IV	1.6 MW	17-12-2011	30-09-2011	29-09-2031

PPAs in OP No.13 of 2023:

Sl.No.	DATE OF PPA	CAPACITY AND PHASE	COD	Tariff rate (Rs./kWh)
1.	29-5-2010	4.80 MW (Phase-I)	02-8-2010	3.50
2.	29-5-2010	4.80 MW (Phase-II)	25-9-2010	3.50

3.	29-5-2010	4.80 MW (Phase-III)	30-3-2011	3.50
4.	29-5-2010	11.20 MW (Phase-IV)	28-9-2010	3.50
5.	29-5-2010	4.80 MW (Phase-V)	30-9-2010	3.50
6.	29-5-2010	9.60 MW (Phase-VI)	02-12-2010	3.50
7.	29-5-2010	10.40 MW (Phase-VII)	31-12-2010	3.50

We shall briefly refer to the pleadings.

OP No.3 of 2023:

A) The case of the petitioner is that since the Commercial Operation Date (COD) it has been supplying energy to the DISCOM and raising regular monthly invoices for the energy supplied, in terms of the PPA, but there was continuous default on the part of the DISCOM in payment of the invoice amounts. Aggrieved by the same, the petitioner filed OP No.15 of 2020 before this Commission to direct the respondent to make payment of the outstanding amount aggregating to Rs.5,88,12,556/- calculated upto 25-12-2019; and that during the pendency of the said OP, the DISCOM has cleared all the arrears till May, 2020 and made partial payments for the period from June, 2020 to December, 2020,

and, as such, this Commission on 02-02-2022 disposed of the said O.P.

B) That from August 2020 not even a single penny has been released by the DISCOM towards the energy supplied to it, resulting in adverse impact on the financial and operational condition of the petitioner; that the petitioner has addressed several letters on 29-7-2022, 15-11-2022 and 06-12-2022 requesting to release the outstanding dues; that, as there was no response from the DISCOM to the aforesaid letters, the petitioner issued letters dated 21-9-2022 and 23-9-2022 to the DISCOM requesting termination of the PPAs; that as there was no response from the DISCOM even to the aforesaid two letters, the petitioner, vide: letter dated 29-9-2022, requested APPCC to take appropriate action for termination of the PPAs and permit the petitioner to sell the power through Open Access. However, there was no response even from the APPCC, and, as such, the petitioner issued another Termination Notice dated 19-11-2022 reiterating the aforesaid request; that, as there was no response from the respondents for more than two months

from the date of issuance of the initial termination notice dated 23-9-2022 and the subsequent reminders, the petitioner got issued termination Notice dated 02-12-2022, through their Legal counsel, inter alia, stating that the pre-requisites of Article-9 of the PPAs have already been complied with by way of the aforesaid letters/notices and, therefore, the PPAs ought to be considered as terminated with immediate effect and the petitioner would sell the power generated by it through Open Access. As there was no response to the aforesaid termination Notice dated 2-12-2022 from the DISCOM, the petitioner got issued a reminder through their Advocate on 19-12-2022 stating that if the DISCOM fails to respond to the said letter within 10 days, the petitioner would be constrained to take appropriate legal action.

C) It is the further case of the petitioner that due to the act of the DISCOM in non-payment of the outstanding amounts, the petitioner could not clear off its dues to their creditors, which resulted in initiation of Insolvency Proceedings against it in NCLT, Mumbai; and that, if the NOC is not granted to the

petitioner to sell the power to third parties through Open Access, the CIRP will be admitted against the petitioner and it would suffer irreparable loss. Hence, the petitioner sought for the directions cited supra.

OP No.13 of 2023:

The case of the petitioner in this OP is almost similar to the case in OP No.3 of 2023, only with the variation in dates.

In this case, it is averred by the petitioner that the DISCOM has committed default in payment of the bills from 2021 under the seven PPAs set forth supra; that the petitioner has filed OP No.113 of 2021 for recovery of the outstanding amounts due aggregating to Rs.18,60,30,535/- calculated upto 09-11-2021; that during the pendency of the said OP, the DISCOM has cleared the bills till April, 2022 by withholding certain amounts from the said bills; that from May, 2022 no amount has been paid; that on 21-6-2022, 14-7-2022, 31-10-2022 and 06-12-2022 the petitioner addressed letters for release of the outstanding dues, but there was no response; that on 11-1-2023 the petitioner issued preliminary termination Notice dated 11-1-2023 to APTRANSCO, marking copies to the DISCOM and APPCC, *inter alia*, stating that in spite of delivery of the power by the petitioner, as per the

terms of the PPAs, the DISCOM has been consistently committing default in payment of the outstanding bills, and, therefore, the said preliminary Notice was issued for curing the default; and that, if the default is not cured within 30 days from the date of receipt of the said Notice, the petitioner would be constrained to terminate the PPA and claim damages.

It is further averred that since the period to cure the defect has lapsed and as there was no response either from the DISCOM or from the other respondent authorities, the petitioner got issued the Termination Notice dated 01-03-2023 through their Advocate, *inter alia*, stating that in view of no response from the DISCOM and the default continuing despite the 30 days notice given to cure such default, the prerequisite of Article 9 of the PPAs has been complied with, and the PPAs ought to be considered as terminated with immediate effect, and that, accordingly, the petitioner terminated the PPAs and it will sell the energy generated from its Project through Open Access. It was also stated therein that, due to the act of the DICOM in not clearing the outstanding dues, the petitioner suffered the Insolvency Proceedings, and, the same are pending, and, if “No Objection Certificate” is not

issued to the petitioner to sell the power through Open Access, it would suffer irreparable loss.

In support of the aforesaid pleadings, both the petitioners relied upon the Order of this Commission in ***M/s.Balaji Energy Private Limited Vs. APSPDCL and two others***¹, wherein this Commission held that the petitioner is entitled to terminate the PPA with immediate effect and to have Open Access as per the extant regulations.

Opposing the aforesaid two Petitions, the respondents filed separate counter affidavits, besides filing OP.Nos.32 and 33 of 2023 seeking to declare the termination Notices dated 02-12-2022, issued by the petitioners in the mid-course of the PPAs, as illegal and void. Since the contents of the counter-affidavits are akin to the contents in the aforesaid two Original Petitions filed by the DISCOM, it is needless to reproduce the same here at the cost of repetition.

As the contents of OP Nos.32 and 33 of 2023 are also similar, it would suffice to mention the contents of OP No.33 of 2023, which are, in brief, as under:

- a) The DISCOM has admitted entering into the PPAs with the petitioners for a period of 20 years and approval of the tariff

¹) Order dated 23-11-2022 in OP No.41 of 2022.

of Rs.3.50 ps per unit by this Commission for the first ten years. The DISCOM also admitted receipt of several letters/termination Notices from the petitioners terminating the PPAs.

- b) It is averred by the DISCOM that the PPAs executed herein, unlike Civil Contracts, were regulated and approved by this Commission under Section 86(1) of the Electricity Act, 2003, and, as such, they cannot be terminated in the midcourse by an unilateral act of the parties or even by mutual consent of both the parties; that, during the period of the PPA, if any modification is required, the parties need to approach this Commission for appropriate relief, including midcourse termination on the grounds stated in the PPAs, but they cannot unilaterally terminate the PPAs; that the relief sought for by the petitioners for issuance of the NOCs is also not maintainable without there being a declaration from this Commission; and that as per Article 10 of the PPAs if any dispute remains unresolved between the parties, they need to approach the Commission for resolution of the same, and,

hence, the notices dated 02-12-2022 and 19-12-2022 are invalid and illegal and deserve to be declared as such.

c) It is further averred that there is no deliberate and willful default on the part of the DISCOM in payment of the monies under the invoices to the petitioners; that though the DISCOM is under financial stress, it is making all efforts to clear the bills; that the amounts due to the petitioner in OP No.32 of 2023 were cleared off till January, 2023 and the new invoice for February, 2023 for Rs.9,12,413/- was received from the petitioner and it would be cleared within the date; that even after the termination notice dated 19-12-2022 the petitioner supplied power and submitted bills and the same were paid by the DISCOM; that, by the subsequent act of the petitioner in receiving the bills, the termination is not permitted in law and the alleged termination of the PPAs is liable to be declared as illegal.

d) It is also averred that the petitioners, having filed separate petitions before this Commission for fixation of tariff from 11th year onwards and obtained orders from this Commission by getting the tariff fixed at 2.64 ps per unit,

waived their right to terminate the PPAs on the ground of default committed by the DISCOM; and that the DISCOM could not respond to the letters/notices of the petitioners due to communication gap and administrative reasons.

- e) It is stated in OP No.32 of 2023 that the amounts due to the petitioner from May, 2022 to January, 2023 were fully paid and, subsequently, no bills were issued by the petitioner.
- f) Thus contending, the DISCOM sought for a declaration that the termination of the PPAs as per the aforesaid Notices is illegal and void.

Both the petitioners filed I.A.Nos.1 of 2023 for amendment of the averments claimed in the OPs., for taking on record the additional facts and grounds mentioned therein.

It is, *inter alia*, stated therein that on 14-4-2023 the petitioners requested the DISCOM for issuance of No Dues Certificates in Format-B, which were issued by the DISCOM on 15-4-2023; that on 19-4-2023 and 25-4-2023 the petitioners requested the DISCOM for issuance of Clearance for sale of power through Open Access in the Indian Energy Exchange Limited (IEX) and National Open Access Registry (NOAR) respectively; that the DISCOM, vide: its letters dated

25-5-2023, rejected the said request stating that all pending dues have been cleared by it; that since the PPAs stand terminated, all obligations *inter se* parties also stand extinguished, and, therefore, any post-facto payments made towards the petitioners' dues can in no manner mean that there is no default on the part of the DISCOM; and that the DISCOM has not made payment towards the invoices raised for the power supplied from May 2022 to April, 2023 in respect of the petitioner in OP No.3 of 2023, i.e., total outstanding of Rs.2,71,98,864/-, including the LPS.

Contentions:

Sri Sohael Buttan, learned counsel for the petitioner, contended that the terms of the PPAs empowered the petitioners to terminate the PPAs, in the event of the DISCOM committing continuous default in payment of the energy charges; that, in the present cases, the DISCOM has committed default in complying with the provisions of Articles 1.6, 5 and 9 of the PPAs; that as per Article 9.1 if the DISCOM commits breach of any of the terms of the PPAs, the petitioners shall be entitled to specific performance of the PPAs or claim damages, at their option, by giving 30 days notice; that under Article 9.3 if the default continues for a period of 30 days or more, either party will have to issue a preliminary

notice for termination of the PPA, and, if the default is not cured within 30 days thereafter, either party can terminate the PPA and claim damages; that, in the present case, the DISCOM has constantly breached the terms of the PPAs in making payments, and, accordingly, as per the terms of the PPAs preliminary default Notices were issued to the DISCOM, followed by the Notice of termination of the PPAs; that the DISCOM has failed to cure its default within the stipulated period under the PPAs; that the PPAs, once terminated, cannot be enforced specifically as held in **Datar Switchgears Ltd., Vs. Tata Finance Limited**²; that since the PPAs got terminated already, all obligations inter se also stand extinguished and, therefore, any post facto payments made towards the dues can no longer absolve the default of the DISCOM; that the plea of the DISCOM that the petitioners ought to have approached this commission under Article 10 of the PPAs is wholly perverse as the petitioners chose to invoke Article 9 of the PPAs, which gives either party the right to unilaterally terminate the PPAs; and that, therefore, the petitions filed by the DISCOMs ought to be dismissed. In support of the aforesaid contentions, he relied upon the Judgements of the Karnataka Electricity Regulatory Commission, viz., **Sandur Power**

²) (2000) 8 SCC 151.

Company Limited Vs. Karnataka Power Transmission Corporation Limited and others & Mangalore Electricity supply Company Ltd., Vs. M/s. Sandur Power Company Limited³ and M/s. Jasper Energy Private Limited Vs. Karnataka Power Transmission Corporation⁴.

He further submitted that Section 16(b) and (c) of the Specific Relief Act, 1963 envisages that specific performance of a contract cannot be enforced in favour of a person who fails to prove that they have already performed or have always been ready or have not violated the essential term. In support of this submission he placed reliance on the decision **Aniglase Yohannan Vs. Ramlatha⁵** and **Ram Awadh Vs. Achhaibar Dubey⁶**. He further submitted that the PPAs being continuous contracts and the DISCOM has been a repeated and continuous defaulter in making timely payments, the PPAs can no longer be specifically enforced; that, even as on date, there are some amounts pending due from the DISCOM; that since no NOCs are issued by the DISCOM, despite the PPAs being terminated, it continued to offtake power from the petitioners; and that, therefore, the petitioner sought for the aforementioned reliefs.

³) Common Judgement dt.11-4-2011 in Appeal Nos.180 of 2009 & 104 of 2010 on the file of the APTEL.

⁴) Judgement dated 30-4-2013 in Appeal No.145 of 2012 on the file of the APTEL.

⁵) (2005) 7 SCC 534.

⁶) (2000) 2 SCC 428

Sri P.Shiva Rao, learned Standing counsel for the DISCOM, while reiterating the contents in the petitions filed by the DISCOM in OP Nos.32 and 33 of 2023, contended that the findings of this Commission in ***M/s.Balaji Energy Private Limited (1 supra)*** are not applicable to the facts of the present cases; that since the termination Notices were not issued to the appropriate authorities as contemplated under Article-8 of the PPAs, they are *non est* in the eye of law and cannot be acted upon; that the petitioners having filed the petitions before this Commission for fixation of tariff from 11th year to 20th year and obtained orders by getting the tariff fixed at 2.64 ps per unit, waived their right to terminate the PPAs; that the termination of the PPAs shall come into effect only by the approval of the Commission but not by the unilateral act of the petitioners; and that until the alleged terminations made by the petitioners are approved by this Commission, such terminations shall not be construed as valid terminations to come into force.

Having regard to the pleadings and contentions of the respective parties, the following common points are framed for adjudication since the facts are common in these OPs:

1. Whether the DISCOM has committed breach of the PPA terms relating to payment?

2. Whether the petitioners have a right to terminate the PPAs, without the intervention of the Commission, and, if so, whether the PPAs were validly terminated by the petitioners? and
3. Whether the petitioners are entitled to Open Access consequent on the termination of the PPAs?

Re Points 1 and 2:

- 1. Whether the DISCOM has committed breach of the PPA terms relating to payment?**
- 2. Whether the petitioners have a right to terminate the PPAs without the intervention of the Commission, and, if so, whether the PPAs were validly terminated by the petitioners?**

Articles 1.6, 5.2, 5.3, 5.5, 5.6 and 9 of the PPAs are relevant for these Points. Hence, they are reproduced hereinbelow:

“1.6: **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 Metering Date provided the bill is received by DISCOM within 5 days from metering date, and in the 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”.

“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 metering date.
- 5.2: The DISCOM shall be entitled to a rebate of 1% of the total amount billed in any billing month for payments made before the due date of payment. Any payment made beyond the due date of payment, DISCOM shall pay interest at existing nationalised bank

rate (Prime Lending Rate) and in case this rate is reduced, such reduced rate is applicable from the date of reduction.

- 5.3 The DISCOM shall pay the bill on monthly basis as per Article 5.1, by opening a revolving Letter of Credit for a minimum period of one year in favour of Wind Power Producer.

5.4: xxx xxx

- 5.5: **Direct Payment:** Notwithstanding the fact that a Letter of Credit has been opened, in the event that through the actions of the DISCOM, Wind Power Producer is not able to make a draw upon the Letter of Credit for the full amount of any bill, Wind Power Producer shall have the right to require the DISCOM to make direct payment of any bill by cheque or otherwise on or before the due date of payment by delivering to the DISCOM on or prior to the due date of payment of such bill a notice requiring payment in the foregoing manner. Without prejudice to the right of Wind Power Producer to draw upon the Letter of Credit if payment is not received in full, the DISCOM shall have the right to make direct payment by cheque or otherwise of any bill such that within 30 days after the date of its presentation to the designated officer of the DISCOM, Wind Power Producer shall receive payment in full for such bill. When either such direct payment is made, Wind Power Producer shall not present the same bill to the Scheduled Bank for payment against the Letter of Credit.

- 5.6. **Billing disputes:** The DISCOM shall pay the bills of Wind Power Producer promptly subject to the clauses 5.1 and 5.2 above. The DISCOM shall notify Wind Power Producer in respect of any disallowed amount on account of any dispute as to all or any portion of the bill. Wind Power Producer shall immediately take up issue with all relevant information with DISCOM which shall be rectified by the DISCOM, if found satisfactory. Otherwise notify its (DISCOM's) rejection of the disputed claim within reasonable time with reasons therefor. The dispute may also be decided by mutual agreement. If the resolution of any dispute requires the DISCOM to reimburse Wind Power Producer, the amount to be reimbursed shall bear interest at existing nationalised bank rate (Prime Lending Rate) and in case this rate is reduced, such reduced rate is applicable from the date of reduction from the date of disallowance to the date of reimbursement".

“ARTICLE 9:- DEFAULT

- 9.1. In the event, DISCOM commits a breach of any of the terms of this Agreement, the Wind Power Producer shall be entitled to specific performance of this Agreement or claim such damages as

would be available under Law or both, at its option, by giving 30 days notice to DISCOM.

- 9.2. In the event, Wind Power Producer commits a breach of any of the terms of this Agreement, the DISCOM shall be entitled to specific performance of this Agreement or claim such damages as would be available under Law or both, at its option, by giving 30 days notice to Wind Power Producer.
- 9.3. If the default continues for a period of 30 days or more, either party will have a right to issue a preliminary notice for termination of this Agreement. If the default is not cured within 30 days thereafter, either party can terminate this Agreement and can claim damages at its option”.

As could be seen from the above Articles of the PPAs, “Due Date of Payment” shall be 30 days from the Metering Date if the bill is received by the DISCOM within 5 days from the Metering Date. In the case of any supplemental or other bill or claim, the due date of payment shall be 30 days from the date of the presentation of such bill or claim to the designated officer of the DISCOM.

For the Delivered Energy purchased, the Wind Power Producer (WPP) shall furnish the bill to the DISCOM for the billing month on or before 5th working day following the metering date. The DISCOM shall pay the bill on a monthly basis by opening a revolving Letter of Credit for a minimum period of one year in favour of the WPP. In the absence of Letter of Credit, the WPP shall have the right to require the DISCOM to make direct payment of any bill by cheque or otherwise on or before the

due date of payment by delivering to the DISCOM on or prior to the due date of payment of such bill a notice requiring payment. The DISCOM shall have a right to make direct payment by cheque or otherwise of any bill within 30 days after the date of its presentation to the designated officer of the DISCOM. When such direct payment is made, the WPP shall not present the same bill to the Scheduled Bank for payment against the Letter of Credit. If the DISCOM disallows any amount on account of any dispute pertaining to a bill, the WPP shall immediately take up the issue with the DISCOM and the latter shall rectify if found satisfactory. Otherwise, the DISCOM shall notify the rejection of the disputed claim within reasonable time with reasons therefor.

In the event the DISCOM commits breach of any of the terms of the agreement, the WPP shall be entitled to specific performance of the agreement or claim such damages as would be available under Law or both, at its option, by giving 30 days notice to the DISCOM. Similar facility is provided in favour of the DISCOM where the WPP is found to have committed breach of any of the terms of the agreement. If the default continues for a period of 30 days or more, either party will have a right to issue a preliminary notice for termination of the agreement. If the

default is not cured within 30 days thereafter, either party can terminate the agreement and claim damages at its option.

In both the cases, it is not in dispute that the DISCOM failed to make payment of monthly bills as per the above noted terms of the agreement.

In OP No.3 of 2023 the petitioner has addressed a letter dated 29-7-2022, wherein the DISCOM was notified that the total dues outstanding as on 20-7-2022 for the period from June, 2020 to June, 2022 were Rs.6,02,93,125/-, in respect of which a separate breakup was given in the said letter. The petitioner called upon the DISCOM to release the said outstanding amount within 10 days from the date of receipt of the said letter, failing which the petitioner would be constrained to take appropriate action under law in terms of the provisions of the PPAs. As neither payment was made nor any response was given to the said Notice, after waiting for nearly two months, the petitioner has sent Notice dated 21-9-2022 requesting the DISCOM to treat the said Notice as a letter for termination of the PPAs on 28-10-2022 for Phases II, III and IV of a total capacity of 7.2 MW. A similar Notice was sent on 23-9-2022 also. As no response was received from the DISCOM, even to these Notices, another Notice was issued on 19-11-2022 with a

request to terminate the PPAs to enable the petitioner to sell the energy generated from its plants through Open Access.

Meanwhile, the Chief General Manager, RAC&IPC of the DISCOM addressed a letter dated 29-9-2022 to the Chief General Manager , Power Purchase, Vidyuth Soudha, Vijayawada, wherein the petitioner's Notice dated 23-9-2022 was referred to and a copy of the said Notice was enclosed for information, to take necessary action. As there was no response still, the PLA Advocates of the petitioner sent a final Notice dated 02-12-2022, which has, *inter alia*, referred to the petitioner's Notice dated 19-11-2022. It is instructive to reproduce the relevant portion of the said Notice hereunder:

"4. In view of the consistent/continuing default by you, our Client has already issued a notice for termination dated 23.09.2022 to you, the above mentioned Notice. In the aforesaid notice/letter, our Client had clearly mentioned and conveyed regarding termination of the PPAs in view of the consistent and ongoing default by you, the above mentioned Notice. This was further followed up with another notice/letter dated 19.11.2022 copied to you, the above mentioned Notice, addressed to Andhra Pradesh Power Coordination Committee ("APPCC") & Ors. wherein our Client had once again reiterated its stand re termination of the PPAs owing to the consistent breach committed by you, the above mentioned Notice. Despite a considerable time having been lapsed since then, you, the above mentioned Noticee, have failed to respond to either of these letters issued by our Client.

5. We further note that while you, the above mentioned Noticee, have chosen not to respond to any of the letters/notices (as mentioned above), however, vide: letter dated 29.09.2022 issued to APPCC, you, the abovementioned, have requested APPCC to take necessary action regarding the termination of the PPAs (which is still awaited).

6. Considering the following aspects involving the factum that (i) more than 2 months have elapsed since the issuance of the notice dated

23.09.2022; (ii) no response to the aforesaid notice dated 23.09.2022 and/or the reminder notice dated 19.11.2022 issued by our Client has been received from you, the above mentioned Notice as yet; and (iii) in view of the consistent and ongoing default by you, the above mentioned Noticee, in making payments against the regular invoices under the PPAs, it is clear that that the prerequisites of Article 9 have already been complied with by way of the aforesaid letters/notices, and therefore, we on behalf of our Client are hereby issuing present notice in terms of which the PPAs ought to be considered as terminated with immediate effect.

7. In light of the above, our Client now treats the PPAs as terminated (in terms of Article 9 of the PPAs) and will accordingly be selling the energy generated from the Project through Open Access (as was indicated previously)".

As the DISCOM has not responded even to the said Notice dated 02-12-2022, a reminder was sent by the petitioner on 19-12-2022 with a request to respond to the earlier letters, including the petitioner's Notice dated 02-12-2022, within 10 days from the date of receipt of the said letter, failing which the petitioner would be constrained to take recourse to appropriate legal remedies.

Similarly, the petitioner in OP No.13 of 2023 addressed letters dated 21-6-2022, 14-7-2022, 31-10-2022 and 06-12-2022 to respondent No.2-AP TRANSCO, marking copies of the same to the DISCOM and respondent No.3-APPCC, for release of the outstanding dues from May, 2022 onwards. As there was no response to the aforesaid letters, the petitioner issued Preliminary Notice of Termination, dated 11-1-2023, under Article 9 of the PPAs, *inter alia*, stating that if the default in

payment of the outstanding dues is not cured within 30 days from the date of receipt of the said Notice, the petitioner would be constrained to terminate the PPAs and claim damages. Since there was no response to the aforesaid Preliminary Termination Notice, even after lapse of 30 days, the petitioner got issued the Notice of Termination, dated 01-3-2023, through their legal counsel-M/s.SKV Law Officers, *inter alia*, stating that the PPAs ought to be considered as terminated with immediate effect and, accordingly, the petitioner treats the PPAs as terminated and would sell the power generated from its project through Open Access.

As the DISCOM has maintained a stoic silence without responding to any of the Notices, the petitioners have been constrained to file OP Nos.3 and 13 of 2023 on 31-1-2023 and 13-3-2023, which were taken on file on 06-2-2023 and 21-3-2023 respectively. After issuance of the Notices, they were posted to 15-2-2023 and 12-4-2023 respectively. On the said dates, the learned Standing Counsel for the DISCOM appeared and took time for filing counters. Accordingly, both the petitions were adjourned to 26-4-2023. On 26-4-2023 both the cases were adjourned to 14-6-2023 in view of the fact that the petitioners have applied for grant of

No Objection Certificates for Open Access after filing of the OPs, and that these facts are required to be pleaded by way of an amendment.

On 26-5-2023 this Commission received the Petitions filed by the DISCOM, which were later numbered as OP Nos.32 and 33 of 2023.

It has been pleaded in O.P. No.3 of 2023 that after August, 2020 no amounts have been released by the DISCOM towards the energy supplied by the petitioner, whereas in OP No.13 of 2023 it has been pleaded that after May, 2022 no outstanding amounts have been paid.

The above facts would reveal, in no uncertain terms, that not only default in payment of monthly bills was committed in violation of the PPA terms, but it (default) also continued for unduly long periods. The DISCOM has failed to respond to innumerable Notices and reminders for months on end. It, however, purported to have cleared the arrears to some extent more than three months after the petitioners filed the OPs and the DISCOM filed counters in those OPs.

As noted hereinbefore, Article-9 of the Agreements vested a right in both the parties to terminate the agreement, if the default is not cured, within 30 days of the Notice, by the other party. It is not in dispute that the petitioners have scrupulously followed the procedure envisaged

under Article-9 of the PPAs by giving Notice(s) repeatedly to cure the defaults, i.e., to pay the monthly bills, and on the DISCOM displaying supine indifference, they got issued the final Termination Notices dated 02-12-2022 and 01-3-2023 in OP No.3 of 2023 and 13 of 2023 respectively, wherein they have clearly exercised their right of termination, as vested by Article-9 of the PPAs, and notified the DISCOM that they would be selling the energy generated from their projects through Open Access.

Sri P.Shiva Rao, learned Standing Counsel for the DISCOM, submitted that the petitioners do not have the unilateral right to terminate the PPAs, more so, when the arrears were cleared by the DISCOM in April, 2023. It is also his submission that under Article-10 of the PPAs a detailed procedure is envisaged for "Dispute Resolution"; and that, if the dispute could not be resolved as per the said procedure, this Commission has to adjudicate upon such dispute.

It is not possible to accept the said submission. Articles 9 and 10 of the PPAs deal with different situations. Under Article-9, a right is created in the parties to the agreement to terminate the same if the circumstances envisaged therein exist, viz., (a) commission of breach of the terms of the agreement, (b) 30 days Notice to cure the default; and

(c) termination of the agreement if the default is not cured within the said time. There is absolutely no dispute on the existence of any of the above aspects in the case on hand. Therefore, the present cases do not fall within the realm of the 'dispute' requiring "Dispute Resolution" under Article-10 of the PPAs. In our opinion, Article-10 attracts the cases, such as billing and other disputes, which do not specifically fall under Article-9. In other words, on an admitted default, the party, who suffered such a default, is conferred with the right to terminate the agreement and can claim damages under Article 9; and, if such default were also to fall under Article-10 (Dispute Resolution), as pleaded by the learned Standing Counsel for the DISCOM, Article-9 would be rendered nugatory. Article-9 envisages a specific situation with respect to which there could not be a dispute. Hence, we reject the contention of the learned Standing Counsel for the DISCOM that the petitioners do not have the unilateral right of terminating the agreements and that they have to necessarily approach this Commission claiming the relief of termination.

The learned Standing Counsel for the DISCOM also submitted that since the DISCOM has made payments, the default has been cured and, hence, termination is illegal.

In **Sandur Power Company Limited (3 supra)**, the Honourable APTEL had an occasion to deal with a similar contention. It is, *inter alia*, held therein, as under:

“51. Summary of Findings:

(i) Clause 6.2 of the PPA expressly provides that the payment shall be made within a period of 15 days from the date of the receipt of the tariff invoice. The definition of “Due Date of Payment” as contained in clause 1.1 would indicate that the payment must be made within 15 days from the date of the receipt of the tariff invoice. If the payment is not made within 15 days as stipulated in clause 6.2 of the PPA, the default in payment occurs. **Once there is an occurrence of default, the same continues to remain as an event of default even after three months, irrespective of the fact that the said dues were settled later or otherwise.** Whenever similar default occurs for the three consecutive invoices in a continuous period of three months, the Appellant is entitled to sell power to the third party under the clause 9.3 of the PPA. The wordings in clause 9.3 of the PPA is so specific and clear by stating “any payment default by the Purchaser for a continuous period of three months, the seller shall be permitted to make third party sale”. In other words, these clauses do not seek penalise mere default of one single payment but seeks to penalise only when there is a continuous default of three months period of time of 3 consecutive invoices. Thus, it is clear that these clauses seek to keep the interest of both the parties in mind. On the basis of these clauses, the State Commission has correctly made a correct interpretation and held in the present case that the Respondent had never paid the payment of the tariff invoices within time continuously for three months period. In view of the above, the interpretation projected by the Respondent is not correct. Therefore, the Appeal filed by the Respondent would fail. This point is answered accordingly”. (***Emphasis supplied***).

Similar is the case in **M/s. Jasper Energy Private Limited (4 supra)**, wherein the facts and agreement conditions are identical to those in the present cases on hand. As payment of monthly bills was not made by the Hubli Electricity Supply Company Limited (the HESCOM), the Developer issued default Notice on 03-2-2011 giving 30 days time to

cure the defaults. But, even after expiry of the 30 days, the HESCOM did not cure the defaults. Therefore, exercising the right under the agreement (Article 9.3.2), the Developer sent termination Notice dated 05-4-2011. As in the present cases, even after receipt of the termination Notice, no steps were taken by the HESCOM to cure the defaults. However, after the Developer approached the Karnataka State Electricity Regulatory Commission (KSERC) certain part payments were made. Though the Commission has accepted the plea of the HESCOM, the APTEL has reversed the said order holding that mere payment of invoice amount, after filing of the petition, would not absolve the HESCOM from the responsibility to cure the default within the time frame.

Following the principles laid down in the aforementioned decisions and for the reasons mentioned supra, we reject this contention of the learned Standing Counsel for the DISCOM.

The learned Standing Counsel for the DISCOM, further contended that since the petitioners have filed different OPs., and got the generation tariff fixed from 11th year to 20th year by this Commission's order dated 28-6-2022, they are deemed to have waived their right to terminate the agreements.

This submission, in our view, is wholly misconceived. While the petitioners have filed the said OPs in the year 2020, the defaults occurred much thereafter. It is not as though after termination of the contract agreements the petitioners approached this Commission for fixing tariffs from 11th year onwards. Merely because this Commission has fixed the tariffs for the next ten years, the DISCOM cannot contend that the petitioners have waived their right to terminate the contract for breach of the terms of the agreement during the period for which tariff was fixed. If this submission is accepted, no PPA could be terminated till the expiry of the period, for which tariffs are fixed by this Commission. Fixing of tariff from 11th year onwards has no bearing on the right of the parties to terminate the agreement during the currency of the period for which the tariff has been fixed. Hence, this contention is rejected.

In ***M/s.Balaji Energy Private Limited (1 supra)***, the DISCOM has committed default in making payment of the bills. After issuing notice to cure the default, the Developer has terminated the agreement exercising its right under Article 9 of the PPA. Consequently, it has approached this Commission by filing OP No.41 of 2022 for a direction to the DISCOM to grant No Objection Certificate to the Developer to sell the power to 3rd parties under Open Access Regulation 2 of 2006. The DISCOM has

taken time for payment. But, it could only make part payment during the pendency of OP. After referring to Article 9 of the PPA, this Commission held as under:

“The above reproduced Articles of the PPA envisage, in unequivocal terms, that if the default continues for 30 days or more, either party will issue a preliminary notice of termination of the agreement; and if the default is not cured within 30 days thereafter, either party can terminate the agreement and can claim damages at its option.

As noted above, the petitioner has issued notices, as envisaged under Article 9.3, on several occasions i.e., on 11-12-2020, 07-1-2021 and 26-6-2021. Despite the above notices, the respondents could not cure the default even till today. In the above admitted facts of the case, the petitioner is entitled to terminate the PPA. Therefore, the PPA is, accordingly, terminated with immediate effect. The petitioner is entitled to Open Access as per the extant Regulations. The petitioner is reserved with the right to seek recovery of the dues by availing a fresh remedy.

The OP is, accordingly, allowed to the extent indicated above”.

The aforesaid order in ***M/s.Balaji Energy Private Limited (1 supra)*** applies in all fours to the present cases on hand. Accordingly, the contention of the learned Standing Counsel is rejected.

In the light of the above reasons, Points 1 and 2 are answered in favour of the petitioners.

Re Point No.3: Whether the petitioners are entitled to Open Access consequent on the termination of the PPAs?

Once the PPAs are terminated, the Generator is entitled to claim Open Access under Section 42 of the Electricity Act, 2003 read with

Interim Balancing and Settlement Code for Open Access Transactions Regulation, 2006 (Regulation No. 2 of 2006).

As noted supra, the petitioners specifically pleaded that on 14-4-2023 they requested the DISCOM for issuance of No Dues Certificates in Format-B; that the same were issued on 15-4-2023; that on 19-4-2023 and 25-4-2023 the petitioners requested the DISCOM for issuance of Clearance for sale of power through Open Access in the Indian Energy Exchange Limited (IEX) and National Open Access Registry (NOAR) respectively; and that the DISCOM, vide: its letters dated 25-5-2023, rejected the said request stating that all pending dues have been cleared by it. In the light of the findings on Points 1 and 2 that subsequent payments would not cure the default already occurred; and that the petitioners had a right to terminate the agreements/PPAs, which were, accordingly, terminated, the DISCOM cannot deny issuance of clearance for sale of power through Open Access to the petitioners.

Point No.3 is, accordingly, decided in favour of the petitioners.

On the strength of the findings rendered hereinbefore, OP Nos.3 and 13 of 2023 are allowed and OP Nos.32 and 33 of 2023 are dismissed. The DISCOM is directed to grant “No Objection Certificates”

to the petitioners for sale of power being generated from their Projects through Open Access in terms of Regulation 2 of 2006. No costs.

Pronounced on this the 20th of December, 2023.

Sd/-
P.V.R Reddy
Member

Sd/-
Justice C.V. Nagarjuna Reddy
Chairman

Sd/-
Thakur Rama Singh
Member

