ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500004

FRIDAY, THE TWENTY-FIFTH DAY OF FEBRUARY
TWO THOUSAND AND TWENTY TWO

:Present:
Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

O.P.No.78 of 2021

Between :
Blyth Wind Park Pvt. Ltd. … Petitioner

And

1. A.P. TRANSCO
2. APSLDC
3. APSPDCL
4. APCPDCL …Respondents

This Original Petition having come up for hearing on 02-02-2022 and upon hearing Ms Mazag Andrabi, learned Counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondents, the Commission made the following:

ORDER:

The O.P. is filed under Section 86(1)(f) of the Electricity Act 2003 (for brevity "the Act") for the following reliefs :

(i) To set aside letter dated 25-02-2021 issued by respondent No.1/APTANSCO;
(ii) to direct respondent No.1 to levy Inter-Discom transmission charges and losses only for 8.8 MW capacity for the period 01-04-2020 to 30-05-2020 and 1 MW capacity for the period 30-05-2020 to 06-11-2020;

(iii) to direct respondent No.1 to continue to process the settlement of energy generated and supplied by the captive project pending adjudication of the O.P.

The petitioner pleaded that it is a 'generating company' as defined in Section 2(28) of the Act and that it is inter alia engaged in the business of generation and sale of wind energy. The petitioner further pleaded that it owns and operates a wind power based Captive Generating Plant of 25.6 MW capacity in the State of Andhra Pradesh; and that the entire energy from its project is being off-taken by the Captive Users within the area of supply of respondent No.3/Discom. That respondent No.1/APTRANSCO is constituted under Section 39 of the Act; that the APERC (Terms and Conditions of Open Access) Regulation 2005 (Regulation No.2 of 2005) and the amendments thereto designated respondent No.1 as the Nodal Agency for receiving and processing applications for all Long Term Open Access (LTOA) transactions; that the Energy Billing Centre (EBC) of respondent No.1 has also been designated as the Nodal Agency for energy accounting and settlement of the Open Access (OA) Generators, Scheduled Consumers and the OA consumers who are connected to the distribution system and such energy accounting and settlement has to be undertaken in co-ordination with the distribution companies of the State of Andhra Pradesh and that respondent No.1 has entered into LTOA agreements dated 03-12-2019 and 06-11-2020

with the petitioner for transmission of electricity generated by its captive project.

It was further pleaded that respondent No.2/APSLDC is constituted under Section 31 of the Act; that the OA Regulations designated respondent No.2 as the Nodal Agency for accounting of energy of the OA Generators, Scheduled Consumers and OA consumers connected to the transmission system; that pending the notification of a Government Company/Authority/Corporation by the State Government for operating respondent No.2, respondent No.1 is acting in the capacity of respondent No.2 in terms of Section 31(2) of the Act and therefore undertaking the energy accounting and settlement of OA Generators, Scheduled Consumers and OA consumers connected to the transmission system. That respondent Nos.3 and 4 are Government owned Companies entrusted with the function of distribution of electricity in certain districts of the State of Andhra Pradesh and that the petitioner entered into LTA Agreement dated 03-12-2019 with respondent No.3 and LTOA agreement dated 06-11-2020 with respondent Nos.3 and 4for wheeling of electricity generated by its captive project through the distribution systems of the said Companies.

The petitioner further pleaded that it has set up 25.6 MW captive project in the State of Andhra Pradesh for supply of electricity to its captive users; that its captive project was commissioned in four phases i.e., 16 MW on

29-09-2014; 8 MW on 02-01-2015, 1 MW on 17-04-2015 and the balance 0.6 MW was commissioned on 24-07-2017; that the petitioner by way of application dated 30-01-2019 applied for LTOA for supply of power from its captive project to its captive users; that respondent No.1/APTRANSCO accorded its approval for grant of LTOA for the period 01-05-2019 to 30-04-2039 vide letter No. CGM/HRD&PLG/EE-CommI&BL/ DEE-1/F-Blyth-25.6/D.No.452/19, dated 29-11-2019; that further thereto respondent No.1 executed LTOA agreement dated 03-12-2019 with the petitioner and respondent No.3 for the period from 01-05-2019 to 30-04-2039 in respect of captive users of the petitioners viz., M/s. SDV Steels Ltd. (HTSC No.VJA-574 at 33 kV level) for 8.8 MW; and M/s. Krishnapatnam Port Company Ltd. (HTSC No.NLR-538 at 132 kV level) for 4.3 MW; that however owing to Covid-19 pandemic and the country-wide lockdown, one of the captive users of the petitioner i.e., M/s. SDV Steels Ltd. had halted all its operations from 20-03-2020 and the petitioner had to immediately stop supplying electricity to the said user; and that accordingly, the petitioner by way of application bearing Ref.No.BWPPL/LTOA/APTRANSCO/FY2020-002, dated 20-04-2020 under Para-10 of the Regulation No.2 of 2005, requested respondent No.1/APTRANSCO to amend the principal LTOA agreement to add new captive users and revise the allocated capacities as under :

Consumer	Capacity (MW)
Krishnapatnam Port Company Pvt. Ltd.	5.00
Aone Steels India Pvt. Ltd.	4.00
Jai Hind Rolling Mills India Pvt. Ltd.	3.00
Malladi Drugs and Pharmaceuticals Ltd.	1.00
SDV Steels Pvt. Ltd.	1.00
Hindupur Steels Pvt. Ltd.	4.00

It was further pleaded that since the petitioner submitted its LTOA application on 20-04-2020, respondent No.1/APTRANSCO should have i.e., by 30-05-2020, communicated to the petitioner either that the LTOA sought can be allowed without further system strengthening or otherwise and that since the LTOA in the petitioner's case could be allowed without further system strengthening, the failure of respondent No.1/APTRANSCO to communicate the same to the petitioner within 30 days from the closure of the window, would entitle the petitioner to deemed approval of its LTOA application.

It was further pleaded that on 27-05-2020, the Chief Engineer, Planning, PS&Commercial of respondent No.1/APTRANSCO by way of letter Ref.No.CE/Plg.PS&Comml/EE-Comml/DEE-OA/F-Blyth-25.6/D.No.162/20 in response to the petitioner's LTOA application requested the petitioner to confirm the group captive status of its proposed captive users/consumers; that the petitioner responded to the said letter of respondent No.1/APTRANSCO by its letter dated 15-06-2020 and submitted the details relating to its shareholding pattern along with the revised allocations of capacity in respect of its captive users and once again requested respondent No.1/APTRANSCO

to grant LTOA approval at the earliest and that the revised capacity allocations of the petitioner are as under :

Consumer	Capacity
Krishnapatnam Port Company Pvt.Ltd.	5.00
Aone Steels India Pvt. Ltd.	3.00
Jai Hind Rolling Mills India Pvt. Ltd.	3.43
SDV Steels Pvt. Ltd.	0.50
Hindupur Steels Pvt. Ltd.	3.43
Total	15.36

It was further pleaded that after an inordinate delay of six months from the date of the petitioner's LTOA application and in contravention of the Regulation No.2 of 2005, respondent No.1/APTRANSCO vide Lr.No.CE/PS, Plg. & Designs/EE-Comml/F-Blyth-25.6/D.No.390/2020 dated 15-10-2020, approved the LTOA application and amendment to the petitioner's existing LTOA agreement inter alia subject to the following conditions:

(i) The amendment to the LTOA agreement shall be executed amongst the petitioner, APTRANSCO, APSPDCL and APCPDCL.

(ii) The petitioner shall abide by the provisions of G.O.Ms.No.35, dated 18-11-2019.

(iii) The date of commencement of revised OA for 25.6 MW capacity will be as mentioned in the amended agreement.

(iv) The petitioner shall pay monthly transmission charges for 9.16 MW and SLDC charges, wheeling charges and also losses in kind for 25.6 MW power as per the Tariff Orders issued by the Commission from time to time.

Subsequently, respondent No.1/APTRANSCO executed LTOA Amendment Agreement dated 06-11-2020 with the petitioner, respondent No.3/APSPDCL and respondent No.4/APCPDCL.

It was further pleaded that this Commission granted license to respondent No.4/APCPDCL to undertake distribution of electricity in certain areas of the State of Andhra Pradesh; that consequently one of the captive users of the petitioner which was earlier within the area of supply of respondent No.3/APSPDCL fell within the area of supply of respondent No.4/APCPDCL; and that accordingly respondent No.4/APCPDCL was made party to the amended LTOA agreement. That till execution of the amended LTOA agreement, there was no intimation from respondent No.1/APTRANSCO or from respondent Nos.3 & 4/Discoms to the petitioner of the migration of one of its captive users to the area of supply of the new distribution licensee/respondent No.4 despite such migration resulted in a significant financial liability for the petitioner in the form of Inter-Discom transmission charges. It was further pleaded that the amended LTOA agreement unequivocally specifies the effective date as 06-11-2020 i.e., the date on which the parties executed the amended LTOA agreement and the same shall be in force from 06-11-2020 to 30-04-2039; and that had respondent No.1/APTRANSCO made the amended LTOA agreement applicable from 01-04-2020, it would have presented the recording of 8.8 MW

as the energy supplied to its captive users – M/s. SDV Steels Ltd., till the date of signing of the amended LTOA agreement, as it had on 20-04-2020 notified respondent No.1/APTRANSCO of the revised allocation and sought approval for amendment of its LTOA agreement.

It was further pleaded that to the utter shock of the petitioner, respondent No.1/APTRANSCO, issued letter dated 25-02-2021 whereby it directed the petitioner to pay Inter-Discom transmission charges and transmission losses in kind for 17.2 MW capacity allegedly allocated to M/s. SDV Steels Ltd., over and above the transmission charges for 8.4 MW capacity in respect of M/s. Krishnapatnam Port Company Pvt. Ltd. and to enter into an amended agreement wherein respondent No.4/APCPDCL will be made a party retrospectively i.e., from 01-04-2020; that the letter dated 25-02-2021 further stated that in case of the petitioner's failure to execute the amended agreement within 30 days from the date of receipt of the said letter, the energy allotment for the petitioner shall be stopped; that the petitioner, by way of letter dated 19-04-2021 responded to the impugned letter and submitted that neither the LTOA approval nor the amended LTOA agreement provide for levy of any additional Inter-Discom transmission charges on account of migration of one of its captive users to the area of supply of respondent No.4/APCPDCL and that in view of the change in capacities allocated to the captive users pursuant to the LTOA application and its

deemed approval, Inter-Discom transmission charges for the period 30-05-2020 to 06-11-2020 cannot be levied for 17.2 MW.

It was further pleaded that the direction to pay the Inter-Discom transmission charges and losses in kind for 17.2 MW capacity is wholly without basis; that the approved allocated capacity for M/s. SDV Steels Ltd. in terms of the principal LTOA agreement was 8.8 MW and 1 MW as per the LTOA application and deemed approval thereof; that in view of the same, the petitioner, if at all, is only liable to pay the Inter-Discom transmission charges for 8.8 MW for the period 01-04-2020 till 30-05-2020 i.e., 30 days from the date of closure of window, and for 1 MW for the period 01-06-2020 till 06-11-2020 i.e., the date of the amended LTOA agreement and as such the demand of respondent No.1/APTRANSCO for payment of Inter-Discom transmission charges and losses in kind for 17.2 MW capacity is completely arbitrary and without any legal basis.

It was further pleaded that as the formation of respondent No.4/APCPDCL was within the knowledge of respondent No.1/APTRANSCO resulting in migration of a captive user of the petitioner into the area of supply of respondent No.4, it ought to have taken necessary steps immediately to amend the principal LTOA agreement and add respondent No.4 as a party;that respondent No.1/APTRANSCO was clearly aware that the creation of the new Discom i.e., respondent No.4 would have a significant financial

impact on the petitioner in the form of Inter-Discom charges, but however it failed in its duty and taking advantage of its own failure, respondent No.1 by way of the impugned letter is seeking amendment of the amended LTOA agreement to change the effective date to 01-04-2020 after an inordinate delay of 11 months for financial gains. It was further pleaded that despite its own inaction and without any fault of the petitioner, respondent No.1 threatened to stop energy settlements in respect of the captive project if the petitioner fails to execute the amendment to the amended LTOA agreement within 30 days of receipt of the impugned letter; that acting on its threat respondent No.1 stopped all settlements of the petitioner; and that while the petitioner has submitted the allocation letters for the period from April 2020 to June 2020 to the EBC on 25-02-2021, the latter has not taken any action whatsoever to process the settlement for the said period.

It was further pleaded that if the petitioner is held liable to pay Inter-Discom charges for any capacity other than the revised capacities set out in the LTOA application, it will result in gross injustice and hardship to the petitioner; that had the petitioner's LTOA application been approved promptly by respondent No.1/APTRANSCO, the instant dispute would not have arisen at all; that being a wholly owned Government company and performing the functions of a public utility, respondent No.1/APTRANSCO is 'State' within the ambit of Article 12 of the Constitution and consequently it must be guided by

principles of fairness and transparency and must not act in an arbitrary manner and that the actions of respondent No.1 are hit by Article 14 of the Constitution of India.

On behalf of respondent No.1/APTRANSCO, its Chief Engineer filed counter denying the plea of the petitioner that the Wind Power based generating plant of 25.6 MW capacity is a captive generating unit. It was further pleaded that the petitioner failed to submit any evidence satisfying Rule 3 of the Electricity Rules 2005 so as to claim that its power project is a captive generating plant and that therefore the O.P. is not maintainable. It was further pleaded that the petitioner is a simple generator to sell the power generated by it to its OA users and therefore it is liable to pay all charges as per the OA Regulations and laws; and that the relief sought by the petitioner to set aside the impugned letter and that it is liable to pay Inter-Discom transmission charges for 8.8 MW only for the period 01-04-2020 to 30-05-2020 and for 1 MW capacity for the period from 30-05-2020 to 06-11-2020,are contrary to the Regulations in force.

It was further pleaded that the petitioner was supplying power under OA renewal agreement dated 03-12-2019 applicable for a period of 20 years i.e., from 01-05-2019 to 30-04-2039 in respect of 25.6 MW; that at the time of entering into the said agreement, it had two OA consumers in Andhra Pradesh; that subsequently on 20-04-2020, the petitioner applied for

amendments to the agreement to add four other OA consumers by which time respondent No.4/APCPDCL was incorporated and part of the area held by respondent No.3/APSPDCL was deleted and included in the area of operation of respondent No.4/APCPDCL and that therefore feasibility report was sought from respondent No.4/APCPDCL for the new Exit Points proposed by the petitioner. It was further pleaded that the petitioner was simultaneously asked to state whether the new Exit Point consumers are the shareholders of the petitioner-company or they are normal OA consumers; that the petitioner has revised its earlier proposal by adding only three Exit Points instead of four Exit Points by deleting the Exit Point relating to M/s. Malladi Drugs and that the petitioner has also revised the allocation of its capacity among five of its OA users including the two existing consumer Exit Points.

Respondent No.1 further pleaded that the petitioner did not submit all the required documents and went on submitting the required documents in a phased manner; that finally the petitioner submitted the consumer priority letters for energy settlement only on 12-10-2020;that therefore after completing the due process for the amendments requested by the petitioner, the same was accorded on 15-10-2020 and that consequently the petitioner entered into amended LTOA agreement on 06-11-2020 duly incorporating the required allocations to five of its Exit Points/consumers.

It was further pleaded that the claim of the petitioner that as per paras 10.2, 10.3, 10.5 to 10.7 of Regulation No.2 of 2005 it is entitled for deemed approval is incorrect; that since it is an amendment and not approval of LTOA, it is para 10.4 of the said Regulation that is applicable and that the petitioner has even changed the proposed amendment by letter dated 15-06-2020; that the revised allocations were given and priority letters of the proposed new Exit Points were given by the petitioner on 12-10-2020 and that immediately approval was given by respondent No.1 on 15-10-2020 and that therefore the provision relating to deemed approval is not applicable. That even prior to 2019, the petitioner was in the habit of changing proposals frequently and used to submit revised proposals during the process of initial process; that since respondent No.4/APCPDCL was formed on 01-04-2020, the petitioner is required to further amend the agreement to include the newly formed Discom as one of the Exit Points is in the area of the new Discom; that in view of the above facts, the petitioner is required to pay transmission charges since the Exit Point of power/OA consumer of the petitioner is in respondent No.4/APCPDCL area whereas its generating station is in respondent No.3/APSPDCL area and that therefore respondent No.1 made the demand vide letter dated 25-02-2020 to pay the transmission charges but the petitioner wants to avoid the liability and wants to pay transmission charges for 8.8 MW

from 01-04-2020 to 30-05-2020 and for 1 MW for the period from 30-05-2020 to 06-11-2020 only.

In the rejoinder filed, while denying the contents of para-2 of the counter, the petitioner reiterated that the entire energy from its 25.6 MW Wind Power project is being supplied to the captive users in accordance with Rule 3 of the Electricity Rules 2005; that in compliance with the requirements of Rule 3, not less than 26% of the ownership in the petitioner's company is held by the captive users and not less than 51% of the aggregate electricity generated by the Wind Project on an annual basis is consumed for captive use, are not in dispute; that respondent No.1/APTRANSCO is not concerned with the petitioner complying with Rule 3 and that till date this Commission, which is the appropriate authority for determination of compliance with Rule 3, has not raised any issue in regard to the same. The petitioner denied the contents of para-3 of the counter as incorrect. With regard to the contents of para-4 of the counter, it was pleaded that the same are a matter of record. It was further pleaded that the petitioner had to withdraw M/s. Malladi Drugs as a captive user in view of the fact that the concerned Discom could not provide the technical feasibility due to non-availability of information.

The petitioner denied the contents of para-5 of the counter to the extent of the allegation of respondent No.1/APTRANSCO that the petitioner submitted the required documents in a phased manner. It was further pleaded

that the information sought by respondent No.1/APTRANSCO in relation to the Group Captive status by way of its letter dated 27-05-2020 was submitted by the petitioner on 15-06-2020; that thereafter respondent No.1/APTRNSCO, on 12-10-2020, after a gap of four months, orally directed the petitioner to submit the consumer priority letters which were submitted by the petitioner on the same day and that when respondent No.1 clearly failed in its duty, it is unfair on the part of respondent No.1 to blame the petitioner; that if any documents relevant to the grant of amended LTOA approval had not been submitted by the petitioner, respondent No.1 should have notified the petitioner of the same and that the in any event, consumer priority letters were not necessary documents for grant of LTOA until 25-01-2021 when respondent No.1 notified the 'process flow for processing LTOA'.

While denying the contents of para-6 of the counter, the petitioner reiterated that all the applications for grant of LTOA including any application for amendment of the existing LTOA agreement were submitted to respondent No.1 under para-10 of Regulation No.2 of 2005; that the petitioner submitted its LTOA application on 20-04-2020 which could be allowed without further system strengthening and therefore the failure of respondent No.1 to communicate the same to the petitioner by 30-05-2020 i.e., 30 days form the closure of the window, would entitle the petitioner to deemed approval of its LTOA application; and that even if the petitioner's subsequent application

dated 15-06-2020 is taken into consideration, the failure of respondent No.1/APTRANSCO to communicate the approval to the petitioner by 30-07-2020 i.e., 30 days from the closure of the window, would entitle the petitioner to deemed approval of its LTOA application. The petitioner further pleaded that if the stand of respondent No.1 is accepted to be correct, it would lead to a situation where no timeline for amendment of a twenty-year long agreement would have been provided under the OA Regulations.

As regards paras 8 and 9 of the counter, the petitioner pleaded that on 31-03-2020, this Commission granted license to respondent No.4/APCPDCL to undertake distribution of electricity in certain areas of the State of A.P; that consequently one of the captive users of the petitioner which was earlier within the area of supply of respondent No.3/APSPDCL fell within the area of supply of respondent No.4/APCPDCL; that accordingly respondent No.4/APCPDCL was made a party to the LTOA Amendment Agreement dated 06-11-2020; that till the execution of the amended LTOA agreement, there was no intimation from respondent No.1/APTRANSCO or the Discoms to the petitioner of the migration of one of its captive users to the area of supply of respondent No.4/APCPDCL despite such migration resulted in a significant financial liability for the petitioner in the form of Inter-Discom transmission charges. That the amended LTOA agreement specifies the effective date as 06-11-2020 i.e., the date on which the parties executed the amended LTOA

agreement, to be effective till 30-04-2039; that the petitioner further pleaded that had respondent No.1/APTRANSCO made the amended LTOA agreement applicable from 01-04-2020, it could have protested the recording of 8.8 MW as the energy supplied to its captive users - SDV Steels Ltd., till the date of signing of the amended LTOA agreement as it had on 20-04-2020 notified respondent No.1/APTRANSCO of the revised allocation and sought approval for amendment of its LTOA agreement. The petitioner denied the contents of para-10 of the counter.

In the written submissions filed by the learned Counsel or the petitioner, she has reiterated the factual background as pleaded in the O.P., commencing from the commissioning of the petitioner's project with 16 MW capacity on 29-09-2014; 8 MW on 02-01-2015; 1 MW on 17-04-2015 and 0.6 MW on 24-07-2017; respondent No.1 granting LTOA in respect of two of two of the petitioner's scheduled consumers on 03-12-2019; halting of its operations from 20-03-2020 by SDV Steels Ltd. due to countrywide lockdown and the consequent stopping of supply by the petitioner to the said OA consumer; the formation of respondent No.4/APCPDCL and the petitioner falling in the area of operation of the said Discom from the area of respondent No.3/APSPDCL w.e.f. 01-04-2020; the petitioner submitting application on 20-04-2020 for amendment of the principal LTOA agreement adding new captive users and revising the allocated capacities; respondent No.1 requesting the petitioner on

27-05-2020 to confirm its group captive status of the proposed captive users and in response thereto the petitioner submitting the details of its shareholding pattern on 15-06-2020; the non-furnishing of technical feasibility report for M/s. Malladi Drugs and the petitioner requesting revision of the previously allocated capacities of its captive users; on 12-10-2020, respondent No.1 directing the petitioner to submit the consumer priority letters and the petitioner submitting the same to respondent No.1 on the same day; respondent No.1 approving the petitioner's LTOA application on 15-10-2020 and the consequential execution of the amended LTOA agreement on 06-11-2020; and finally, respondent No.1 directing the petitioner to pay the Inter-Discom charges in view of the change of area of one of its OA consumers i.e., SDV Steels Ltd., to the area of operation of respondent No.4/APCPDCL vide letter dated 25-02-2021.

Relying on para 10.6 of Regulation No.2 of 2005, it has been submitted that in cases where LTOA can be allowed without further system strengthening, respondent No.1/APTRANSCO must intimate the petitioner of the grant of LTOA within 30 days of closure of the window; that para-16 of the said Regulation allows an LTOA grantee/user to change Entry and/or Exit Points twice a year, but the Regulation did not provide for the procedure in relation thereto; that in the absence of a specified procedure, respondent No.1/APTRANSCO shall require the LTOA user seeking changes in its

approved Entry and/or Exit Points and/or allocated capacities any time during the year, to file a fresh application for grant of LTOA reflecting the changes sought by the LTOA user; that since the petitioner notified respondent No.1/APTRANSCO of the changes in its captive users and the allocated capacities on 15-06-2020 and since no further system strengthening was required, respondent No.1/APTRANSCO should have communicated its approval to the petitioner by 30-07-2020. It is further submitted that respondent No.1/APTRANSCO, in para-6 of the counter admitted that the petitioner's LTOA application is covered by para-10 of Regulation No.2 of 2005; that however respondent No.1 did not communicate its approval of the LTOA application to the petitioner within the timeline stipulated by para-6 of the Regulation, by 30-07-2020, but granted approval after an inordinate delay of four months on 15-10-2020 and also delayed the execution of the amended LTOA agreement till 06-11-2020; that due to the delay on the part of respondent No.1 in granting LTOA approval in contravention of the Regulation, the petitioner is allegedly liable to pay approximately Rs.1,71,98,899/- instead of Rs.97,77,152/- towards Inter-Discom charges for 17.2 MW from 01-04-2020 to 06-11-2020; and that respondent No.1 has not provided any reasons for the delay in granting the LTOA approval. It is further submitted that Regulation No.2 of 2005 was framed by this Commission in pursuance of the delegation of power under Section 181 of the Act and therefore the provisions of the said Regulation are mandatory and enforceable and that non-compliance or

contravention of the Regulationis punishable under Sections 142 and 146 of the Act. In this regard, the learned Counsel placed reliance on the Judgment of the Hon'ble APTEL in **Parrys Sugar Industries Ltd. Vs. KERC and others (Appeal No.140 of 2012, dt.27-09-2012)** and of the CERC in **Jindal Steel and Power Ltd. Vs. SLDC, Odisha and others (Petition No.29/MP/2017, dt.03-07-2018).**

It is further submitted that by directing the petitioner to pay the Inter-Discom charges for 17.2 MW for the period 01-04-2020 to 06-11-2020, respondent No.1/APTRANSCO is taking advantage of its own wrong; that due to the delay in granting approval of the amendment to the LTOA, the petitioner had no option but to bank the energy it had earlier been supplying to SDV Steels Ltd. and intended to supply to the new captive users; that while the Discoms recover banking charges for the banked energy, respondent No.1 will also levy transmission charges for the 8.8 MW capacity that was never transmitted to SDV Steels Ltd; that the delay in granting the LTOA approval was on account of inaction of respondent No.1 which is beyond the control of the petitioner; and that in such a scenario, directing the petitioner to pay the Inter-Discom charges for any capacity other than the revised capacities set out in its LTOA application dated 15-06-2020 will result in gross injustice and hardship to the petitioner.

Relying upon the Judgments of the Hon'ble Supreme Court in ***Competent Authority Vs. Bangalore Jute Factory and others***(Civil Appeal No.7015 of 2015, dt.22-11-2005) and ***Commissioner of Income Tax Vs. M/s. Pearl Mech. Engg. & Foundry***(Civil Appeal No.1196 of 2001, dt.16-04-2004), it has been submitted that it is well settled that every word of a statute has to be given its due meaning and that when the statute requires a particular act to the done in a particular manner, the same has to be done in that manner alone.

While submitting that para-10 of Regulation No.2 of 2005 is mandatory, it has been further contended that the instant case does not require a determination whether non-compliance of para 10.6 of the Regulation will invalidate/nullify the Open Access granted to the petitioner or not and that it is to be considered whether it is valid, just and fair to subject the petitioner to a liability that has accrued due to the failure of the respondent No.1 to comply with para-10.6 of the Regulation. She has further submitted that the Hon'ble Supreme Court time and again held that in determining whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent on a consideration of the entire statute, its nature, object and the consequences that would result from construing it in one way or the other or in connection with other related statues and that such determination does not depend on the form of the statute. It is further submitted that one of the

objects of the Act is to provide non-discriminatory Open Access *inter alia* to generating companies and consumers; that the thrust of the National Electricity Policy and the National Tariff Policy issued under Section 3 of the Act, which have been held to be 'delegated legislations', is also on promotion of captive power projects and therefore it is for the State Commissions to provide a facilitative framework for grant of Open Access; that in furtherance thereof, the Commission, in exercise of its powers under Section 181 of the Act laid down the necessary regulatory framework through Regulation No.2 of 2005 for grant of Open Access including but not limited to the timelines within which such Open Access must be provided and that the primary reason in providing such a timeline is to prevent the licensees from arbitrarily delaying the grant of Open Access. That in a catena of decisions the Hon'ble Supreme Court held that the term 'shall' in its ordinary significance is 'mandatory' and the Court shall ordinarily give such interpretation unless such an interpretation leads to some absurdity or inconvenient consequence or be at variance with the intent of the legislature to be culled out from other parts of the Act and that in that sense the petitioner considers para 10.6 to be mandatory or at the very least 'part mandatory and part directory' as respondent No.1 does not have the option to deny Open Access. Placing reliance on the Judgment of the Hon'ble Supreme Court in ***State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another***(Civil Appeal No.4395 of 1986, dt.16-04-1987), it is submitted that even assuming that para 10.6 is directory

in nature, the same must be complied with substantially and relied on the following observations of the Hon'ble Supreme Court in the said Judgment :

> *"4.3 It is true that the provisions of Rules 5, 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance."*

It has been submitted that in the instant case, there was inordinate delay in complying with para-10.6 of the Regulation by respondent No.1 and the same has resulted in grave injustice to the petitioner. While further submitting that there is a duty cast on this Commission for enforcing the Regulation and therefore it cannot allow the licensees to violate the provisions of the Regulation – mandatory or directory, much less subject the petitioner to be unjustly affected by such violations, reliance has been placed on **Municipal Board Hapur Vs. Raghuvendra Kripal and others (Civil Appeal No.583 of 1962, dt.23-09-1965)** in this regard.

In the written submissions filed on behalf of respondent No.1, the learned Standing Counsel relied on para-15 of APERC (Power Evacuation from Captive Generation, Cogeneration and Renewable Energy Source Power Plants), 2017 (Regulation No.3 of 2017) which laid down that the date on which the first machine of the Power Project synchronizes with the Grid shall be the Commercial Operation Date of the project; and that the

object of incorporating such a clause is that the APTRANSCO needs substantial time for provision of evacuation facility by the date of synchronization of the first machine. He has also submitted that the amended Regulation No.1 of 2016 is applicable for the Wind projects commissioned during the operative period of A.P. Wind Power Policy 2015 i.e., from 13-02-2015 to 12-02-2020 in the State of Andhra Pradesh and since the first machine of the petitioner's Wind Power Project was synchronized with the Grid on 01-09-2014, the said Regulation whereunder the proviso is added to para 10.6 thereof, is not applicable to the petitioner and that despite the same the petitioner is relying on the said proviso to claim deemed approval only to evade the Inter-Discom transmission charges payable to respondent No.1/APTRANSCO. The learned Standing Counsel further submitted that as no consequences are laid down under Regulation No.2 of 2005 for not informing the applicant within 30 days of closure of a window by the Nodal Agency that LOTA sought can be allowed without further system strengthening, para 10.6 of the said Regulation is only directory but not mandatory and that therefore the petitioner is required to pay the applicable transmission charges and transmission losses in kind as per the letter dated 25-02-2021 upto 06-11-2020 or at least upto 15-10-2020 on which date LTOA approval was given by the respondent No.1/APTRANSCO.

Having regard to the respective pleadings of the parties, the following Points emerge for adjudication :

1. Whether the application dated 20-04-2020 as modified by letter dated 15-06-2020 can be treated as a fresh application under Clause 10.2 r/w. Clause 10.4 of Regulation No.2 of 2005 for LTOA ?

2. Whether Clause 10.6 of Regulation *ipso facto* applies to the application dated 20-04-2020 ?

3. Whether the petitioner is entitled to the benefit of deemed approval as envisaged under the proviso to Clause 10.6 of the Regulation as added by Regulation No.1 of 2016 ?

4. Whether respondent No.1 is responsible for non-approval of LTOA on or before 30-07-2020 ?

5. Whether the petitioner's liability for payment of Inter-Discom charges on 8.8 MW capacity allotted to SDV Steels cannot be extended beyond 30-07-2020 ? If it is extended, upto what date?

Since all the Points are inter-related, they are discussed in common.

In exercise of its powers under Section 181(1) r/w. Sections 42(2), 42(4), 39(2)(d)(ii) and Section 40(c)(ii) of the Electricity Act 2003 this Commission has framed Regulation No.2 of 2005 laying down the terms and conditions of Open Access. The Regulation provides for grant of STOA and LTOA for Open Access users. The instant case is concerned with LTOA. The State Transmission Utility (STU) -respondent No.1 herein is the Nodal Agency for receiving and processing the LTOA applications. Para 10 of Regulation No.2 of 2005 laid down the procedure for application for LTOA. Para 10.1 mandates that the Nodal Agency shall make available the format of application for Open Access. Under sub-para (2) thereof, an application for

LTOA shall be filed with the STU by the applicant with a copy to the concerned transmission/distribution licensee(s) and the application fee shall be accompanied by a non-refundable processing fee as prescribed by the Commission. Under sub-para (4), after submitting the Open Access application, the applicant becomes aware of any material alteration in the information contained in the application, the applicant shall promptly inform the Nodal Agency of the same. Under sub-para (5) thereof, all the applications received within a calendar month shall be considered to have been simultaneously filed and the window of a calendar month shall keep rolling over i.e., after the expiry of a monthly window, another window of the duration of the next calendar month, shall commence. Under sub-para (6), the Nodal Agency shall allow Open Access within 30 days of the closure of window, if it is determined based on system studies conducted in consultation with other agencies involved including other licensee(s) that LTOA sought can be allowed without further system strengthening. Under sub-para (7), if on the basis of the results of the system study, the licensee(s) are of the opinion that the LTOA sought cannot be allowed without further system strengthening, the Nodal Agency shall notify the applicant of the same within 30 days of the closure of window. Thereafter, at the request of the applicant, which shall be made within 15 days of such notification by the Nodal Agency, the latter shall carry out further studies, if required, to identify the scope of works involved and intimate the same to the applicant within 30 days of receipt of such

request from the applicant. The Nodal Agency shall also inform the applicant of the probable time frame for execution of the works involved after consultation with the concerned licensee(s).

Regulation No.2 of 2005 underwent an amendment by way of Regulation No.1 of 2016. The preamble of the said amendment reveals that the Government of Andhra Pradesh (GoAP) has issued new Solar Power Policy 2015 and new Wind Power Policy 2015 vide G.O.Ms.No.8 dated 12-02-2015 and G.O.Ms.No.9 dated 13-02-2015 respectively, superseding the earlier Solar Power Policy 2012 and Wind Power Policy 2008; that the GoAP vide its letter dated 19-03-2015 issued in exercise of its powers under Section 108 of the Act, requested this Commission to adopt and issue necessary Regulations/orders for giving effect to the A.P. Solar Power Policy 2015 and the A.P. Wind Power Policy 2015. One of the amendments carried out to Regulation No.2 of 2005 is the addition of a proviso to para-10.6 of the Principal Regulation, which reads as under :

"*Provided that in the absence of any response or intimation from the Nodal Agency to the applicant within 30 days of closure of a window, then such application shall be deemed to have been allowed Open Access by the Nodal Agency in terms of such application.*"

Ms.Mazag Andrabi, the learned Counsel for the petitioner emphatically submitted that in the absence of a provision for amendment of LTOA permission, any application for such amendment shall fall under paras 10.1

and 10.2 and that, therefore, the proviso to para-10.6 automatically gets attracted. The learned Counsel further submitted that in view of para 10.5, under which the window of a calendar month closes on the last day of a month and considering the modified letter dated 15-06-2020 as having been made on 30-06-2020, being the last day of the month, respondent No.1 ought to have granted LTOA on or before 30-07-2020 and that therefore the petitioner's liability, in the worst scenario towards inter-discom charges in respect of 8.85 MW capacity originally allotted to SDV Steels, shall be limited to 30-07-2020 only and not beyond the said date.

Sri P. Shiva Rao, learned Standing Counsel for the respondents submitted that the petitioner's application cannot be treated as a fresh application as it has sought modification of the LTOA approval already granted and the concluded agreement and that in any event the proviso to para 10.6 is not attracted to the petitioner's case as the amendment Regulation No.1 of 2016 by which the said proviso was added was made specifically applicable to Solar Power projects commissioned during the operative period of A.P. Solar Power Policy 2015 i.e., from 12-02-2015 to 11-02-2020 and from 13-02-2015 to 12-02-2020 in respect of Wind Power projects. The learned Counsel further submitted that as stated in para-3.1 of the O.P., by 12-02-2015, the date from which the policy commenced which is the starting point for the application of the amendment, the petitioner has commissioned the project to the extent of

24 MW out of 25.6 MW capacity and that therefore the petitioner does not fall within the framework of the amended Regulation.

We have carefully considered the submissions of the learned Counsel for the parties.

Let's first consider the submission of the learned Counsel for the petitioner that its application for amendment of the LTOA falls under para 10.2 r/w. para 10.4 of Regulation No.2 of 2005. A plain reading of para 10.2 shows that it envisages filing of an application for LTOA. Under para 10.4 if after submission of the Open Access application, the applicant becomes aware of any material alteration in the information contained in the application, the applicant shall promptly inform the Nodal Agency of the same. A conjoint reading of these two sub-paras would undoubtedly disclose that they deal with filing of a fresh application for Open Access and furnishing of information regarding material alteration in the information contained in the application, if any. On a proper reading of para 10.4, it is evident that it only facilitates the applicant to furnish information regarding material alterations, if any, after the filing of the application and not after grant of LTOA and entering into an agreement. In this regard, we may observe that even the respondents failed to comprehend this sub-para from a proper perspective, as evident from their averments in para-6 of their counter. Be that as it may, while the petitioner's initial application dated 30-01-2019 for LTOA certainly falls under para 10.2, its

two subsequent applications dated 20-04-2020 as amended by another application dated 15-06-2020 will not fall either under para 10.2 or under para 10.4, because neither of these two applications are for fresh LTOA nor they can be treated as the ones filed for material alteration in the Open Access application for the simple reason that as the petitioner's original application having already been accepted, LTOA having been granted on 29-11-2019 and also LTOA agreement having been entered between the petitioner and respondent No.3 on 03-12-2019, there remained no application for alteration. Indeed, a perusal of the petitioner's application dated 20-04-2020 fortifies the above conclusion of ours. The subject mentioned in the said application reads "Application for LTOA amendment of Blyth Wind Park Pvt. Ltd." No doubt the petitioner has filed the application in the format as given out in Annexure-I as evidently the Regulation does not envisage a separate format for amendment of the existing agreement, much less a separate provision for such amendment. The mere fact that the petitioner was allowed to use Annexure-I meant for filing of fresh application for LTOA does not alter the nature of the petitioner's application which is meant for amendment of the agreement.

Had the petitioner's plea that the application dated 20-04-2020 was in the nature of a fresh application been correct, respondent No.3 would have entered into a fresh agreement in supersession of the previous agreement. But that was not to be. Annexure P-7 filed by the petitioner clearly shows that

respondent No.3 has entered into LTOA amendment agreement based on the LTOA agreement with modified capacities and certain changes in the users. From the above discussion, we have no hesitation to hold that the two subsequent applications of the petitioner do not fall under paras 10.2 and 10.4 of Regulation No.2 of 2005.

The question, however, is in the absence of a specific provision for amendment, whether respondent No.1 had the power to amend the LTOA approval. While we certainly realise the vacuum in the Regulation governing the contingency of amendment of Open Access approval of the agreement, in our opinion, till this vacuum is properly filled, the Open Access granting authority shall be conceded with the power to amend, vary or rescind the approvals granted by it applying the analogy of Section 21 of the General Clauses Act 1897. Viewed from this angle, we are of the opinion that the petitioner's application does not fall under para-10 in *stricto sensu* and consequently even the proviso to para-10.6 cannot be applied. However, we are conscious of the fact that even while exercising the incidental or ancillary power not specifically envisaged by the Regulation, the respondents have to act with promptitude and they cannot take their sweet time to grant amendment sitting over the applications. We shall therefore examine whether there is justification for respondent No.1 in not granting approval for amendment to LTOA till 15-10-2020.

It is the pleaded case of the petitioner that it was first granted LTOA on 29-11-2019 for supplying power to two of its consumers viz., M/s. SDV Steels Ltd. at 33 kV voltage with an allocation of 8.8 MW and M/s. Krishnapatnam Port Company Pvt. Ltd. with an allocation of 4.3 MW; that allegedly due to Covid-19 pandemic, M/s. SDV Steels stopped operations w.e.f. 20-03-2020; that on 20-04-2020 the petitioner filed the application for amendment of LTOA agreement by revising the list of consumers and for variations in allocations in respect of the existing consumers; that beside M/s. SDV Steels and M/s. Krishnapatnam Port Company Pvt. Ltd., the original allocatees, the petitioner added four more consumers including M/s. Malladi Drugs and Pharmaceuticals Ltd; and that as per the revised allocation, M/s. SDV Steels has been reduced to 1 MW capacity while M/s. Malladi Drugs and Pharmaceuticals was allocated 1 MW. It needs to be noted at this stage that respondent No.3/APSPDCL was bifurcated into two Discoms by carving out respondent No.4/APCPDCL w.e.f. 01-04-2020 and one of the petitioner's consumers, i.e., M/s. SDV Steels, was included in the jurisdiction of the new entity i.e., respondent No.4/APCPDCL. The Chief Engineer/Planning (PS & Commercial) /APTRANSCO-respondent No.1 addressed letter dated 27-05-2020 to the petitioner which is filed by the petitioner as Annexure P-4. A perusal of this letter shows that vide his letter dated 21-04-2020, which was issued a day after receiving the petitioner's request for amendment, the Chief Engineer/Planning/PS&Commercial has requested the Chief General

Manager/IPC of respondent No.3-APSPDCL and the Chief Engineer/Zone/Kadapa to furnish the field feasibility report with necessary recommendations for four nos. of new Exit Points for issuing approval for amendment to the existing LTOA agreement; that the Chief Engineer/IPC/APSPDCL vide his letter dated 23-05-2020 requested to confirm the group captive status of the said four entities and that the Chief Engineeer/Planning, PS & Commercial has accordingly called upon the petitioner to confirm the group captive status for all the Exit Points and to furnish the relevant documents as per the Electricity Rules 2005. In response to the said letter, the petitioner vide letter dated 15-06-2020 submitted its shareholding pattern. The petitioner also informed in the said letter that as the Discom concerned has not issued the technical feasibility for M/s. Malladi Drugs and Pharmaceuticals Ltd., the petitioner is withdrawing the said consumer and was submitting the revised allocations for further processing of its LTOA file. In its counter filed on behalf of respondent No.1, it is stated that the petitioner has submitted priority letters of the proposed new Exit Points only on 12-10-2020 and that immediately thereafter i.e., on 15-10-2020, respondent No.1 has approved the amendment sought by the petitioner and the amended agreement was entered into on 06-11-2020. In its rejoinder, the petitioner has not denied the fact that it has given priority letters of the proposed new Exit Points only on 12-10-2020.

The undeniable facts that emerge from the above discussion are that a day after receiving the petitioner's application for amendment of the LTOA agreement, the Chief Engineer concerned of respondent No.1 has called for field feasibility report; that upon receipt of the response from the Discom, the Chief Engineer has sent communication dated 27-05-2020 to the petitioner i.e., within four days of receipt of the field feasibility report, calling for confirmation of group captive status along with relevant documents as per Electricity Rules 2005; and that the petitioner has taken almost three weeks to confirm the group captive status of the proposed consumers. The petitioner, however, sought further amendment to the list of allocations by deleting M/s. Malladi Drugs. Evidently, the petitioner has taken time till 12-10-2020 to supply the required information, including furnishing of priority letters of the proposed new Exit Points. Within three days thereafter, LTOA approval was given.

As the fulcrum of the petitioner's case is para 10.6 of the Regulation, we would like to discuss its case from this angle also even if the petitioner's two subsequent applications are treated as falling under para 10.2 read with para 10.4 of the Regulation. No doubt, the proviso to para 10.6 adumbrates deemed approval in the absence of any response or intimation from the Nodal Agency to the applicant within 30 days of closure of the window. As noted

hereinbefore, this para was added by Regulation 1 of 2016. The relevant para of the preamble of the said Regulation reads as under :

> *"Whereas the Government of Andhra Pradesh has issued the new Solar Power Policy, 2015 and new Wind Power Policy 2015 vide G.O.Ms.No.8, dated 12-02-2015 and G.O.Ms.No.9, dated 13-02-2015 respectively superseding the earlier Solar Power Policy 2012 and Wind Power Policy, 2008, inter alia, to meet the twin objectives of energy security and clean energy development.*
>
> *And whereas the Government of Andhra Pradesh vide its letter No.348/Power.II(2)/2015, dated 09-03-2015, citing the provisions of Section 108 of the Electricity Act, 2003, requested the Andhra Pradesh Electricity Regulatory Commission to adopt and issue necessary Regulations/Orders for giving effect to the Andhra Pradesh Solar Power Policy, 2015 and the Andhra Pradesh Wind Power Policy, 2015.*
>
> *Among other things, the above policies certain incentives in respect of the following items/parameters (which come under the purview of the Commission and require amendments to the existing Regulation) to the Solar and Wind Power Projects commissioned during the operative periods of the policies viz., from 12-02-2015 to 11-02-2020 in respect of Solar Power Projects and from 13-02-2015 to 12-02-2020 in respect of Wind Power Projects in the State of Andhra Pradesh."*

It is quite evident from the above reproduced preamble portion of the Regulation that the same was made in pursuance of the new Solar Policy 2015 and Wind Power Policy 2015 issued vide G.O.Ms.No.8, dated 12-02-2015 and G.O.Ms.No.13-02-2015 respectively. It is further clear therefrom that the said policies applied to the developers which have commissioned their Solar and Wind Power Projects between 12-02-2015/13-02-2015 and 11-02-2020/12-02-2020 respectively. Consequently, the amended Regulation governs the said projects only. On

the petitioner's own pleading, out of the total capacity of 25.6 MW, 24 MW were commissioned by 21-01-2015 which date precedes the date from which the new Wind Power Policy 2015 commenced. It is only 1.6 MW which was commissioned after the commencement of the Policy. As noted, respondent No.1 in its written submissions has relied upon Regulation No.3 of 2017 to buttress its plea that the petitioner falls outside the scope of the proviso to para 10.6 as it has commissioned its project by synchronizing with grid prior to the commencement of the new Wind Power Policy 2015. The last para of Clause 15 of Regulation No.3 of 2017 reads as under :

> "The concerned APTRNSCO/DISCOM will issue permission for synchronization of power project with the Grid for commercial operation and date on which the 1st machine of the power project synchronizes with the grid shall be the Commercial Operation Date (COD) of the project."

If we apply the said Clause in the Regulation, the petitioner falls outside the scope of the new Wind Power Policy 2015 and consequently the amended Regulation No.1 of 2016. We are conscious of the fact that in the present case the dispute arises in respect of Open Access while Regulation No.3 of 2017 pertains to evacuation guidelines covering different types of power generation plants like Solar, Wind, Small Hydro, Bio-mass and Municipal Solid Waste. Though the context in which the above Clause was incorporated was different, we do not find anything wrong in applying the same analogy to the present context of the case. Even otherwise also, when the entire project, except a miniscule of it (1.6

MW out of 25.6 MW) was commissioned prior to the commencement of the new Wind Power Policy 2015, the petitioner cannot be allowed to plead that its project is deemed to have been commissioned only after commissioning of the entire capacity. The petitioner is not supported by any Regulation or guidelines in support of such a plea. For this reason also, we are not inclined to apply the proviso to para 10.6 of Regulation No.2 of 2005, to the petitioner's case.

We are left with one last aspect, i.e., what is the date upto which the petitioner is liable to pay Inter-Discom charges in respect of 8.8 MW capacity allocated to M/s. SDV Steels?

As noted hereinabove, approval for LTOA was granted on 15-10-2020. However, the amended agreement was entered only on 06-11-2020. The pleadings on either side are silent as to the reason for the time gap between the two stages. Once LTOA approval is granted allowing the petitioner's application for amendment, entering into the amended agreement remains a formality. It is not the pleaded case of the respondents that the reasons for the time loss in entering into the amended agreement are attributable to the petitioner.

Therefore, we do not find any justification for levy of Inter-Discom charges beyond 15-10-2020. This shall necessarily mean that the petitioner is

liable to pay the Inter-Discom charges on the disputed capacity of 8.8 MW only upto 15-10-2020.

In the light of the above discussion, we have no hesitation to hold that the petitioner is liable to pay Inter-Discom charges for the said capacity till amendment to LTOA was approved on 15-10-2020.

In the result, the O.P. is partly allowed to the extent of relieving the petitioner from the obligation of paying Inter-Discom charges for the disputed capacity after 15-10-2020, while dismissing the O.P.., in respect of the rest of the reliefs claimed in the O.P.

Sd/-	**Sd/-**	**Sd/-**
Thakur Rama Singh	**Justice C.V. Nagarjuna Reddy**	**P. Rajagopal Reddy**
Member	**Chairman**	**Member**