ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

Vidyut Niyantrana Bhavan,
Adjacent to 220/132/33/11 KV AP Carbides Sub-Station,
Dinnedevarapadu Road, Kurnool-518002, Andhra Pradesh

***

TUESDAY, THE THIRD DAY OF SEPTEMBER,
TWO THOUSAND AND TWENTY FOUR

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:Present:

Justice C.V. Nagarjuna Reddy, Chairman
Sri Thakur Rama Singh, Member
Sri P.V.R.Reddy, Member

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O.P.No.82 of 2023

Between:
M/s. Sarda Metals & Alloys Ltd.
Having its registered office at 125,
B-wing, Mittal Court, Nariman Point,
Mumbai, Maharashtra - 400 021

...Petitioner

And:
Transmission Corporation of Andhra Pradesh Limited,
Vidyut Soudha, Gunadala, Eluru Rd, Vijayawada,
Andhra Pradesh- 520004.

...Respondent

This Original Petition has come up for final hearing before us on 24-7-2024 in the presence of Sri Saunak Kumar Rajguru, counsel representing Sri T.G.Rajesh Kumar, learned Counsel for the Petitioner; and Sri P.Shiva Rao, learned Standing Counsel for the respondent; that after carefully considering the material available on record and after hearing the arguments of the learned counsel for both parties, the Commission passed the following:

ORDER

M/s. Sarda Metals & Alloys Ltd has filed this petition under Sections 86(l)(b) and (e) of the Electricity Act, 2003 (for short "the Act") r/w Clauses 9 and 10.1 of the APERC Renewable Power Purchase Obligation (Compliance by purchase of Renewable Energy/Renewable Energy Certificates) Regulations, 2012 and 2017 (RPPO Regulations 2012 and 2017) and Clause 57 of the APERC (Conduct of Business) Regulations 1999, seeking, *inter alia*, the following reliefs:

(a) To carry forward Sarda's RPPO for FY 2017-18 to FY 2022-23 to corresponding FY 2024-25 to FY 2029-30 respectively without any adverse financial liabilities;

(b) To hold and declare that Sarda's RPPO liability is capped as per the RPPO rate prescribed by MoP's Clarificatory Orders dated 01.02.2019 and 01.10.2019 for CPPs i.e., CPPs commissioned before 01.04.2016 will have RPPO as per the Commission's RPPO prescribed in FY 2015-16; and

(c) as an ad-interim measure, keep this Commission's notices dated 30.05.2023 and 04.10.2023 in abeyance till the present Petition is disposed of.

The averments of the petitioner in brief are narrated, hereunder:

(a) The petitioner is engaged in the business of manufacturing and export of manganese-based Ferro Alloys (primary element for steel making) and operates 2x33 MVA and 1x36 MVA Ferro Alloys plant at Vizianagaram, Andhra Pradesh, and also operates 80 MW Captive Power Plant (CPP), with pulverised fuel fired

boiler, within the same premises; that from out of the 80 MW installed capacity of the CPP, 66 MW of power is being consumed by its Ferro Alloys plant, 6 MW of power is being used towards auxiliary consumption and the balance 8 MW is being exported to the Grid for sale to third parties; that the said CPP was synchronised on 03.02.2013; and that from 15.02.2013, it has been supplying power through Open Access (OA) to AP DISCOMs and other consumers in terms of the APERC (Terms and Conditions for Intra-state Open Access) Regulations, 2006.

(b) As per Clause 2(i) r/w Clause 3.3 of the RPPO Regulations, 2012 and 2017, a CPP falls under the ambit of an “Obligated Entity” and is hence obligated to fulfil its Renewable Power Purchase Obligation (RPPO); that the primary means to fulfil the RPPO is either by purchasing Renewable Energy ("RE”) or Renewable Energy Certificates ("RECs”); that the petitioner, being an “Obligated Entity” as per Clause 2(i) of Regulations, 2012 and 2017, is obligated to fulfil its obligation under Clause 3.3 thereof; that the petitioner, as a CPP, does not procure power from the DISCOMs or other generators, there is no means by which it could have procured Renewable Energy (RE); that during the FY 2012-2013 to FY 2019-20, the petitioner faced grave financial distress, due to which it was not in a position to incur additional expenditure towards purchase of Renewable Energy Certificates

(RECs); that, during the FY 2013-14 to FY 2019-20, the REC prices were substantially higher as compared to the subsequent periods, i.e., Rs.2.10 crores on an average for each financial year; that owing to precarious financial conditions during the FY 2013-14 to FY 2019-20 and the consequential financial distress due to operational challenges, the petitioner was not in a position to incur the additional expenditure for purchasing the RECs; that during FY 2020-21 to FY 2022-23 trading in RECs was stayed due to operation of the judicial orders passed by the Honourable APTEL in Appeal No. 113 of 2020 & Batch and the Honourable High Court of Delhi in W.P. (C) 15477/2022; that the reasons for non-fulfilment of RPPO are inadvertent/ unintentional and beyond the reasonable control of the petitioner, and therefore, the petitioner sought to carry forward its RPPO for FY 2017-18 to FY 2022-23 to the corresponding FY 2024-25 to FY 2029-30 respectively. To prove its precarious financial position and availing debt facility from its lenders, the petitioner has filed the Chartered Accountant's Certificate during FY 2013-14 to FY 2020-21 and the debt sanction letters dated 6.11.2015 and 17.03.2016 as Annexures 3 and 4.

(c) It is averred in the petition that this Commission, on administrative side, has issued a show cause notice to the petitioner on 27.12.2021 calling upon it to show cause as to why it

should not be directed to deposit a penalty of Rs.16.4 Crores for non-compliance of the RPPO for the FY 2017-18 & FY 2018-19; that the petitioner submitted its reply on 07.04.2022; which was rejected by this Commission, vide Order: dated 30.05.2023; that, subsequently, this Commission issued another show cause notice to the petitioner on 04-10-2023 calling upon it to show cause as to why it should not be directed to deposit a penalty of Rs.10.52 Crores for non-compliance of the RPPO for the FY 2019-20; and that vide: letters dated 10.10.2023 and 27.10.2023, the petitioner responded to this Commission's notices dated 30.05.2023 and 04.10.2023 respectively, *inter alia*, requesting this Commission to withdraw the said show cause notices as it is in process of filing a petition before this Commission seeing exemption from RPPO in terms of the applicable laws.

(d) It is further averred that the petitioner is willing to comply with the RPPO for FY 2017-18 to FY 2022-23 in the corresponding FY 2024-25 to FY 2029-30, respectively, either by purchasing Renewable Energy (RE) or RECs or by installing the WHR Boiler to generate RPPO equivalent RE power, so as to offset the RPPO deficit in the said financial years; but, however, it is alleged that (as per RPPO Regulations 2012 and 2017 read with the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulation, 2010): (a) the RECs purchased in a particular year by an Obligated Entity to fulfil its RPPO compliance requirement accounts for RE procured in the said

financial year only; (b) purchasing RECs in the subsequent financial years cannot retrospectively offset the RPPO deficit for FY 2017-18 to FY 2022-23 unless the RPPO compliance requirement for FY 2017-18 to FY 2022-23 is specifically allowed to be carried forward to corresponding FY 2024-25 to FY 2029-30 respectively by this Commission; (c) if the petitioner purchases RECs without this Commission carrying forward RPPO compliance requirement for FY 2017-18 to FY 2022-23, it will only be treated as a "voluntary buyer" of RECs and will continue to be considered as RPPO non-compliant for FY 2017-18 to FY 2022-23 in the eye of law; and (d) therefore, without any directions from this Commission to carry-forward the RPPO compliance requirements, the petitioner is not in a position to meet its RPPO for FY 2017-18 to FY 2022-23 either by purchasing RE or RECs; and that, therefore, the present Petition is being filed seeking carry forward of the RPPO of the petitioner for FY 2017-18 to FY 2022-23 to corresponding FY 2024-25 to FY 2029-30 respectively so as to remedy the RPPO shortfall during FY 2017-18 to FY 2022-23.

(e) It is also averred that this Commission has "wide regulatory power" to allow the petitioner to carry forward its RPPO of FY 2017-18 to FY 2022-23 to FY 2024-25 to FY 2029-30. In support of its plea, the petitioner has relied upon the decision of this Commission in ***R.P. No. 19 of 2015 in O.P. No. 19 of 2014 [APEPDCL vs. Nil]***, wherein this Commission has allowed AP DISCOMs RPPO of FY 2012-13 to FY 2016-17 to be carried forward to each corresponding year from FY 2017-18 to FY 2021-22; and also the decisions of the Honourable

Supreme Court in ***Hindustan Zinc Ltd. v. RERC***[1], ***Transmission Corporation of AP Ltd. vs. Rain Calcing Ltd***[2], ***Energy Watchdog v. CERC***[3], ***GUVNL V. Solar Semiconductor Power Co. (India) (P) Ltd***[4], ***U.P. Power Corpn, Ltd. v. NTPC Ltd***[5].

(f) It is further averred that the petitioner's RPPO liability ought to be capped as per the RPPO prescribed by Ministry of Power's ("MoP") Clarificatory Orders dated 01.02.2019 and 01.10.2019 for CPPs, and not as per the rates prescribed in the APERC RPPO Regulations, 2012 and 2017; that the aforesaid MoP's Clarificatory Orders draw statutory force by virtue of Section 3 of the Act read with Clause 6.4.1 of the Tariff Policy, 2016, and that, therefore, they are binding on all SERCs. In support of this plea, the petitioner has relied upon the decision of the Honourable Supreme Court in ***Energy Watchdog (3 supra) and Maharashtra State Electricity Distribution Company Limited (MSEDCL) vs. Adani Power Maharashtra Ltd. & Ors***[6].

The respondent-APSLDC has filed a counter, *inter alia*, stating that:

(a) the Ministry of Power, with the object to achieve the target of Renewable Energy of 1,75,000 MW by March 2022, has notified the long term growth trajectory of Renewable Power Purchase Obligation

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[1]) (2015) 12 SCC 611
[2]) 2019 SCC OnLine SC 1537
[3]) (2017) 14 SCC 80
[4]) (2017) 16 SCC 498
[5]) (2009) 6 SCC 235
[6]) 2023 SCC Online SC 623

for the years 2016-17 to 2021-22 uniformly to all the States and Union Territories, vide: orders dated 22-7-2016 and 14-6-2018; that, basing on the said orders, the MNRE has directed the SERCs to notify the RPOs, in line with aforesaid uniform RPO trajectory, for their respective States by exercising their power conferred under the Electricity Act, 2003; that, accordingly, this Commission, in exercise of its functions under Section 86 of the Act, has notified the RPPO targets, vide: Regulation 1 of 2012 for the FY 2012-13 to 2016-17 and Regulation 1 of 2017 for the FYs 2017-18 to 2021-22; that as per Clause (3) of Regulation 1 of 2012 & 2017 every consumer owning a captive generating plant of installed capacity of One (1) MW and above and connected to the Grid, shall purchase Renewable Energy Certificates issued under the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010, as amended from time to time, corresponding to a minimum quantity of electricity expressed as a percentage of its consumption of energy, during FY 2012-13 to FY 2016-17 and during FY 2017-18 to FY 2021-22 as specified in TABLE-I; that as per the said Regulations there is no distinction between the consumers availing their captive power with that of other consumers; and that if the request of the petitioner is to be accepted, the Regulations are to be amended first and then the criteria of the level playing field will be missed and the object of the Regulations will be defeated.

(b) The respondent has denied the plea of the petitioner, that “MoP’s

Clarificatory Orders draw statutory force by virtue of Section 3 of the Act read with Clause 6.4.1 of the Tariff Policy, 2016 and they are binding on all SERCs", and stated that, as per the terminology employed under Section 86(1)(e) of the Act, the State Commission alone has the power to specify the percentage of RPPO; and that all other orders by any other Authority, including the Government, are only recommendatory but not having the effect of mandatory nature.

(c) It is further averred by the respondent that the financial distress of the petitioner can never be a ground to extend/postpone its RPPO obligation; that Clause-7 of Regulation 1 of 2017 clearly states that the Entities, who have not complied with the RPPO, are liable for penalties as provided therein; that since 2021 onwards this Commission went on directing the petitioner to comply with its RPPO obligations and also warned it of imposing penalties by issuing show cause notices; that as the replies submitted by petitioner to the said show cause notices were rejected by this Commission, the petitioner is precluded from re-agitating the same; that the case law cited by the petitioner regarding the powers of this Commission on the aspect of extending the time lines/postponing the obligation cast on the Obligated Entities, in particular, beyond the current control period, does not formulate any ratio to be a binding precedent;

that the grounds canvassed by the petitioner for postponing the compliance of RPPO to a different control period are absolutely not permitted in law; and that, therefore, sought for dismissal of this petition.

On 7-3-2024 the petitioner filed a rejoinder reiterating its stand in the main petition. It is, *inter alia*, stated therein that the contention of the respondent that if the reliefs sought by petitioner in the Petition are to be accepted, then (a) the RPPO Regulations will have to be amended, (b) the criteria of the level playing field will be missed, and (c) the object of the RPPO Regulations would be defeated, are erroneous and misconceived; and that it cannot be a ground to deny the petitioner its legitimate relief.

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

1. Whether the claim of the petitioner for carrying forward its RPPO for FY 2017-18 to FY 2022-23 to the corresponding FY 2024-25 to FY 2029-30 respectively is sustainable? and
2. Whether the petitioner is entitled to the alternative relief of capping the RPPO as per the rates prescribed by MoP's clarificatory orders dated 01-02-2019 and 01-10-2019 for CPPs?

<u>Re Point No. 1</u>: Whether the claim of the petitioner for carrying forward its RPPO for FY 2017-18 to FY 2022-23 to the corresponding FY 2024-25 to FY 2029-30 respectively is sustainable? and

With a view to encourage generation and consumption of renewable energy as a part of the Country’s efforts to reduce the emission of the

greenhouse gases and protect the environment, this Commission, in exercise of its powers vested under Sections 61, 66, 86(1)(e), and 181 of the Electricity Act 2003, framed the Regulation, 2012 for prescribing the obligation for purchase of Renewable Power and its compliance by purchase of Renewable Energy/Renewable Energy Certificates. This Regulation governed a period of five years from 1st April 2012 to 31st March 2017, which. *inter alia*, stipulates Renewable Purchase Obligations on certain categories, including the consumers owning a captive generating plant of the installed capacity of (1) MW and above. These categories shall purchase RE certificates issued under the CERC Regulation, 2010, as amended from time to time, corresponding to a quantum of not less than 5% of its consumption of Energy, during each of the years from 2012-13 to 2016-17 (each year commencing from First April of the calendar year and ending on 31st March of the subsequent calendar year). The Regulation further prescribes that a minimum percentage (0.25%) out of the 5% RPPO shall be procured from the generation based on solar as a renewable energy source. Clause 7.1 of the Regulation, 2012 envisages consequences of default. Under this Clause if the Obligated Entities do not fulfil the RPPO as provided under Clause-3 of the Regulation, 2012 during any year, the Commission may direct the Obligated Entities to deposit into a separate fund, to be created and maintained by State Agency, such amount the Commission may determine on the basis of the shortfall in

units of RPPO and the forbearance price as decided by the Central Commission. Under Clause 7.2, the Obligated Entities failing to comply with the RPPO shall, in addition to the compliance of the directions under Clause-7.1 above, be liable for penalty as may be decided by the Commission under section 142 of the Electricity Act.

For the subsequent control period, viz., FY 2017-18 - FY 2021-22, the Commission framed fresh Regulation, viz., Regulation, 2017. These Regulations are also in *pari materia* with Regulation, 2012, with the main difference being variation in the percentages of the RPPO. Under this Regulation the following RPPOs have been prescribed.

Year	**2017-18**	**2018-19**	**2019-20**	**2020-21**	**2021-22**
Non - Solar	6%	7%	8%	9%	10%
Solar	3%	4%	5%	6%	7%
Total	9%	11%	13%	15%	17%

The petitioner, which is a consumer of APEPDCL, established a Captive Power Plant of 18 MW capacity, and it falls within the definition of "Obligated Entities." The petitioner has defaulted in compliance of RPPO during the control period commencing from FY 2017-18. Therefore, proceedings were initiated for recovery of the amounts prescribed for non-compliance of RPPO under the Regulation,

2017. Accordingly, a show cause notice was issued by this Commission on 27-12-2021 for FY 2017-18 and FY 2018-19. A reply was sent by the petitioner to the said show cause notice, wherein it was pleaded that one of its group of companies viz., SMAL has established group captive WHRB, and that the power generated by the said Captive Plant shall be set off. The petitioner has also sought for capping the RPPO as per the Ministry of Power notification No. 30/04/2018-R & R dated 01-02-2019

As regards the exemption of power generation from WHRB, the Commission has directed APSLDC to deduct the power generated by the said Captive Power Plant from the RPPO Obligation. Accordingly, APSLDC, vide: email dated 02-01-2023, revised the amount payable by the petitioner by reducing the liability to Rs.19,57,28,370 after accounting for such exemption. By Order dated 30-05-2023, this Commission determined the petitioner's liability at Rs.16,46,90,400 without the GST component.

Interestingly, the petitioner has allowed the said order for FY 2017-18 and FY 2018-19 to attain finality and, without responding to the show cause notice for FY 2019-20, it has filed this OP seeking rescheduling/ postponement of the RPPO compliance for a period of 7 years for each of FY 2017-18 to FY 2022-23. In the considered view of the Commission, the claim of the petitioner regarding the FY 2017-18

& FY 2018-19 is not maintainable, as the Order dated 30-05-2023 for those two years has not been challenged through appropriate legal proceedings and has thus attained finality. By filing the present OP, purportedly under section 86 of the Act, the petitioner cannot seek the relief of postponement of RPPO, which has the effect of nullifying the Commission's own order without challenging it before the competent Forum by availing for appropriate legal remedy.

The relief claimed by the petitioner effectively amounts to review of this Commission's order. Once this Commission has issued an Order, in exercise of its Regulatory Jurisdiction, the petitioner cannot invoke the Commission's Adjudicatory Jurisdiction to undo what the Commission has already done. The petitioner has adopted an unprecedented approach. The Commission is, therefore, of the considered view that the petitioner cannot seek any relief in respect of the FY 2017-18 and FY 2018-19 covered by the Order dated 30-05-2023. Even otherwise, on the merits, the petitioner is not entitled to the relief claimed, for reasons recorded infra.

In support of its case, the petitioner has relied on various orders from different Regulatory Commissions that have accepted the requests of different Obligated Entities. The petitioner contends that this Commission has the authority to postpone the RPPO. To fortify its stand, the petitioner has relied on the decision of the Honourable

Supreme Court in ***Hindustan Zinc Ltd (1 supra)***. The relevant portion of the said decision reads as follows:

> *"49 With reference to the above said rival legal contentions urged by the parties we are of the view that in terms of the impugned Regulation 9 of the Regulations, if a default is made in fulfilling RE obligation then, obligated entity has to deposit the renewable purchase obligation (RPO) charge, as determined by RERC and such amount will be put in a separate fund, created and maintained for the said purpose by obligated entity. This fund shall be utilised partly for (a) purchase of certificates through State agency and (h)for development of transmission and sub-transmission infrastructure for evacuation from generating stations based on renewable energy sources. The deposit of the RPO charge is compensatory in nature. Sections 142 and 147 of the 2003 Act provide the statutory backup for penal consequences in contravention of the impugned Regulations framed under Section 181 read with Section 86(l)(e) cf the 2003 Act. The penalty imposed by impugned Regulations is not in nature of "tax " but to achieve the object and intendment of the 2003 Act. The penalty imposed by the impugned Regulations upon the captive generating companies who do not comply with the requirements as provided under Regulation 9 of the impugned 2010 Regulations are not in nature of "tax" but it is a "surcharge" levied under Section 39(2) of the Act but an alternative mode of enforcement of regulation upon them for ensuring its compliance to achieve the laudable object of the Act, in case obligated entity makes default in fulfilling the renewable purchase obligation as provided under the Regulation 9 of the impugned Regulations 2010.*
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> *51. In view of the above provision, the obligated entity in case of genuine difficulty may seek to carry forward of RE obligation or also may seek waiver. Therefore, in view of the aforesaid reasons, the contentions urged on behalf of the appellants in this regard must fail. It is pertinent to note the submission made on behalf of RERC that 21 States in the country have framed similar regulations imposing such renewable purchase obligation on both distribution licensees as well as captive gencos entities such as the appellants herein. The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy which principle is enshrined in the Act, the National Electricity Policy of 2005 and the Tariff Policy of 2006. The provisions requiring purchase of a minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution in the area by utilising renewable energy sources as much as possible in larger public interest. The High Court has considered the submissions of the appellants and has rightly rejected the same on the ground that the RE obligation imposed on the captive gencos under the impugned Regulations is neither ultra vires nor violative of the provisions of the 2003 Act and cannot in any manner be regarded as a restriction on the fundamental rights guaranteed to the appellants under the Constitution."*

A careful reading of the above judgement shows that the challenge mounted against the Regulation, imposing RPPO, was rejected by the Supreme Court. The Apex Court clearly held that the main purpose of the Regulation is to achieve the laudable object of the Act (to promote the generation and consumption of renewable energy, thereby reducing reliance on fossil fuels and protecting the environment.). It was further held that recovering amounts from Obligated Entities which failed to meet their RPPO and developing renewable energy sources is crucial and that the Commission, under Sections 142 and 146, may impose penalties for contravening the impugned Regulations. The Supreme Court, while declining to strike down the RPPO Regulations, however, made a passing remark that, in cases of genuine difficulty, the Obligated Entities may seek to carry forward or request a waiver of their Obligations.

It is important to note that the Regulations do not explicitly contain any Clause for exemption or postponement for the RPPO compliance. However, the Regulations contain Clause-10 under the heading 'Miscellaneous,' which states that nothing in these Regulations shall be deemed to limit or affect the Commission's power to issue orders necessary to serve the ends of justice or prevent the abuse of its process. When the Commission considers invoking Clause-10, which is residuary in nature, it should be established that

non-compliance with RPPO was due to reasons beyond the control of the Obligated Entity.

Let us examine the reasons presented by the petitioner for seven years of non-compliance. The petitioner cited grounds of financial distress from 2012 to 2020 and the non-disbursement of assured subsidies by the Government of Andhra Pradesh and claimed that this has affected their ability to meet the Renewable Energy Obligations up to FY 2022-23. Further, they mentioned the ground of non-availability of alternative energy sources during FY 2022-23.

As regards the aforementioned ground of the alleged financial distress, having not sought postponement of RPPO for the financial years 2012-13 to 2016-17, it cannot urge the said ground for the subsequent period. Even if the petitioner had any genuine difficulties, it was expected to have approached this Commission contemporaneously, i.e., either during the currency of FY 2017-18 and FY 2018-19 or at least immediately after the expiry of the relevant period.

On the other hand, the petitioner waited till 30-05-2023, when the final orders were passed for FY 2017-18 and FY 2018-19. Indeed, there was a gap of nearly 18 months between the issuance of the show cause notice and passing of the final order by this Commission. The petitioner leisurely approached this Commission, seven (7) months

after passing of the final order for FY 2017-18 and FY 2018-19. If the petitioner had genuine issues with RPPO compliance, it should not have waited for such a long period as seven years.

As regards FY 2019-20, the petitioner is equally guilty of laches, as it has failed to approach this Commission seeking postponement of its Obligation either during the currency of FY 2019-20 or immediately thereafter. Instead, it allowed the show cause notice to be issued on 04-10-2023 and only approached this Commission thereafter. This conduct of the petitioner clearly suffers from un condonable laches, besides the lethargic attitude on its part.

The above discussed facts suggest that the petitioner completely failed to discharge its RPP Obligations and only woke up after the final order was passed for FY 2017-18 and FY 2018-19, and the show cause notice was issued for FY 2019-20. The request of the petitioner, in seeking postponement of RPPO for as long as 7 years, is hence unacceptable.

In this context, it is important to note that the purpose of the RPPO is to encourage the generation and consumption of Renewable Energy by minimising the use of energy based on fossil fuels to protect the environment. Unless the RPPO for each year is scrupulously followed, the objective of reducing fossil fuel consumption would be rendered otiose. The damage in such cases could become irreversible.

Therefore, non-compliance with the RPPO cannot be brooked, as it is directly related to the protection of ecology and the environment. Merely citing economic and operational problems cannot justify non-compliance of the RPPO.

This Commission finds that the petitioner's reliance on orders in certain cases is misplaced. Indeed, in the case of ***APEPDCL*** (***R.P. No. 19 of 2015 in O.P. No. 19 of 2014)***, which has been cited by the petitioner, this Commission rejected further postponement after an initial postponement of the RPPO, vide: Order dated 03-1-2024 in O P No. 25 of 2023. The relevant portion of the said order is reproduced below.

> *"It is undeniable that Global Warming is threatening the very existence of life on the Planet Earth. In order to protect the environment from further degradation by use of fossil fuels, the Act has made it obligatory on the consumers and licensees to purchase prescribed quantities of electricity from renewable sources of energy. Accordingly, extant Regulations have been made. In the competing interest between Human Survival and Economic Considerations, the former should always outweigh the latter. By not adhering to the prescribed RPPO, the consumer/licensee will be avoiding its obligation to protect the environment by reducing the use of fossil fuels. By postponing the RPPO, the very object of prescription of RPPOs will be made nugatory. This Commission has already shown indulgence once in favour of the petitioner. The petitioner cannot, time and again, seek further indulgence. There are number of entities, such as the petitioner, which are to comply with RPPO. Once any lenience or indulgence is shown, we are afraid we will be opening the floodgates. In the present scenario, where Global Warming is developing into Global Boiling, "survival" should be the first principle to be adopted; lest, we will be doing grave injustice to our posterity.*
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> *There is one other reason to reject this petition in limine. The revised timelines expired in 2021 itself. The petitioner failed to approach the Commission on the expiry of each year, when it failed to comply with that year. It only filed the petition two years after expiry of the entire revised block period. The petition, thus, suffers from un condonable laches.*

For the above mentioned reasons, the Commission is not inclined to accept the prayer for rescheduling the RPPO. In the result, the OP is dismissed".

The orders of various Commissions cannot be relied upon as binding precedents on this Commission, as the decisions of the individual Commissions turned on their own facts.

In light of the above discussion, Point No.1 is held against the petitioner.

Re Point No. 2: **Whether the petitioner is entitled to the alternative relief of capping the RPPO as per the rates prescribed by MoP's clarificatory orders dated 01-02-2019 and 01-10-2019 for CPPs?**

An alternative submission has been advanced by Mr. Saunak Kumar Raj Guru, learned counsel for the petitioner, stating that, in the event the Commission is not inclined to allow the prayer for the postponement of RPPO, the petitioner is entitled, at least, for a ceiling on the percentage of RPPO in terms of the Clarificatory Orders dated 01.02.2019 and 01.10.2019 issued by the Ministry of Power, GoI. The learned counsel further submitted that since the Clarificatory Orders were issued by the Ministry of Power in exercise of its powers under Section 3(3) of the Electricity Act, read with Clause 6.4.1 of the Tariff Policy 2016, they are binding on this Commission. To buttress the above submission, the learned counsel has relied upon the decisions of the Apex Court in ***Energy Watchdog (3 supra), Maharashtra State Electricity Distribution Company Limited (6 supra)*** and ***Tata***

Power Company Limited vs. MERC[7]. The petitioner also relied upon certain other decisions, which, in the Commission's view, need not be referred to or discussed, as the law on the proposition advanced by the learned counsel for the petitioner is crystallised in the above three judgments in addition to a the judgement in ***PTC India vs. CERC***[8].

Before adverting to the legal position emerging from the above decisions, it is necessary to refer to the two Clarificatory Orders, relied upon by the learned counsel for the petitioner. The first mentioned Order, issued by the Government of India, Ministry of Power, is dated 01.02.2019. A perusal of this order shows that it was issued as a clarification to the orders relating to the renewable purchase obligation. It has been stated in the said Order that with reference to MoP's Orders dated 22-7-2016 and 14-6-2018 and having regard to the request of various stakeholders regarding capping of RPO for Captive Power Plants, the MoP, in consultation with the Ministry of New and Renewable Energy, has clarified that the RPPO of the CPP may be pegged at the RPPO level applicable in the year in which the CPP was commissioned; that as and when the company adds to the capacity of the CPP, it will have to provide for additional RPPO as obligated in the year in which the new capacity is commissioned; and that there should not be an increase in the RPPO of the CPP without

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[7]) (2022) SCC Online SC 1615.
[8]) (2010) 4 Sec 603)

any additional fossil fuel capacity being added. In the Clarificatory Order dated 01.10.2019, it has been further stated that for CPPs commissioned before 01.04.2016, the RPPO should be at the level as mandated by the appropriate Commission for the year 2015-16, and for CPPs commissioned from 01.04.2016 onwards, the RPPO level as mandated by the appropriate Commission or the Ministry of Power, whichever is higher for the year of commissioning of the CPP, shall be applicable.

Statutory Environment

The Electricity Act, 2003 has been enacted in supersession of the previous enactments, namely, the Electricity (Supply) Act, 1948, and the Indian Electricity Act, 1910. As can be seen from the Objects and Reasons of the Act, 2003, one of the objectives of enacting this statute is to distance the regulatory responsibility from the Government and vest the same with the Regulatory Commissions. Due to this objective, the Electricity Regulatory Commissions have been constituted as autonomous and independent bodies, without any power of interference by the respective Governments, except for the power of the appropriate Governments to issue directions in the matters of policy involving public interest. The Act has created watertight compartments, for regulation of intrastate and interstate supplies. While the Central Commission is empowered to regulate the tariffs of

generating companies owned and controlled by the Central Government and to regulate and determine tariffs for Interstate transmission of electricity, similar powers with respect to Intrastate transmission and supply have been vested in the respective State Regulatory Commissions. While, under Section 107 of the Act, the Central Commission shall be guided by the directions in matters of policy involving public interest as may be given by the Central Government, in writing, under Section 108, the State Commission shall be guided by such directions as may be issued by the State Government concerned, in writing.

Under Section 61 of the Act, an appropriate Commission shall, subject to the provisions of the Act specify the terms and conditions for the determination of the Tariff and, in doing so, shall be guided by what is specified in sub- Clauses (a) to (i) of the said provision, which includes the National Electricity Tariff Policy.

Under Section 62 of the Act, the appropriate Commission shall determine the Tariff for supply of electricity by generating company to distribution licensee, Transmission of electricity, Wheeling of Electricity and Retail Sale of Electricity.

Under Section 63, the appropriate Commission shall, subject to provisions of Section 62, adopt the tariff, if such Tariff is determined

through a transparent process of bidding, in accordance with the guidelines issued by the Central Government.

Section 86 of the Act enumerates the functions of the State Commission, which, *inter alia*, include the promotion of cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and the sale of electricity to any person, and also specifying for the purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.

Under Sub-Section (4) of Section 86 of the Act, in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and the Tariff Policy published under Section 3 of the Act.

The aforementioned provisions would, without any cavil of doubt, show that as regards the Intrastate transmission and supply of power, the respective State Commissions have been vested with exclusive power of regulating the tariffs and all other aspects related thereto. However, in specifying the terms and conditions for the determination of Tariff and also in discharge of its functions under Section 86 of the Act, the State Commissions shall be guided, *inter alia*, by the National Electricity Policy and Tariff Policy.

In pursuance of its powers under various provisions, as discussed above, this Commission has framed RPPO Regulations, 2012 and 2017. The primordium of the learned counsel for the petitioner's submission is that the National Tariff Policy is *per se* binding on the State Commissions and that as the two MoP Orders have been issued in exercise of the said powers, the Commission is bound to adhere to the ceiling placed in the MoP's Clarificatory Orders on the RPPO for the Captive Power Plants. To substantiate this submission, the learned counsel for the petitioner has placed heavy reliance on the judgement in ***Energy Watchdog* (3 supra).**

In ***Energy Watchdog* (3 Supra)**, the following issues were framed for adjudication:

1. Whether the Central Commission had the requisite jurisdiction to decide this matter.
2. Whether the Commission was entitled to fix the tariffs and/or modify fixation under Section 63, that is, if the tariff was an outcome of competitive bidding.
3. Whether the respondents were entitled to raise and claim the benefit of force-Majure and change in law.

The above issues came to be framed when the generator claimed an additional payment under a "Change in Law" provision. While the present case is not concerned with Issues 1 and 2, Issue No.3 assumes some relevance because the Hon'ble Supreme Court, held that any policy orders or directions issued by the Government of India have

statutory force and, hence, will fall within the phrase “Change in Law”. Based on this, the Hon’ble Supreme Court held that the letter dated 31.07.2013 and the revised Tariff Policy issued by the GoI in that case, being statutory documents issued under Section 3 of the Act, have the force of law. Relying on the above finding, the learned counsel for the petitioner submitted that as the two Clarificatory Orders of MoP, referred to above, were issued as a part of the Revised Tariff Policy by the Central Government, they are statutory documents and, hence, binding on this Commission.

The judgement in ***Energy Watchdog (3 supra)*** has been referred to and clarified in ***Tata Power Company Ltd (7 supra)***. The Hon’ble Supreme Court has taken note of the submission of the counsel for the appellants in that case that, in view of the judgement in ***Energy Watchdog***, the National Tariff Policy 2016, being a statutory document issued under Section 3 of the Act, has the force of law and that, therefore, the National Tariff Policy is binding on the Commission. Dealing with the said submission, the Hon’ble Supreme Court held as under.

> *“125. The counsel for the appellants has relied on observations made by a two-Judge Bench of this Court in Energy Watchdog (supra) that the NTP 2016 is a 'statutory document being issued under Section 3 of the Act and has the force of law' to argue that the NTP is binding on the Commission. In Energy Watchdog (supra), Adani Enterprises Consortium submitted its bid for the proposed project and was selected as the successful bidder. However, the law in Indonesia had changed in 2010 and 2011 which aligned the export price of coal from Indonesia to international market prices instead of the price that was prevalent in the*

last forty years. Adani Power filed a petition before CERC seeking relief due to the impact of the Indonesian Regulation to either discharge them from the performance of the Power Purchase Agreement on account of frustration, or to evolve a mechanism to restore the petitioners to the same economic condition prior to the occurrence of the change in law. Clause 4.7 of the Guidelines for determination of Tariff by Bidding Process which was included through an amendment stipulates that:

> *"any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for bid submission shall be adjusted separately. In case of any dispute regarding impact of any change in law, the decision of the appropriateCommission shall apply".*

126. In this context, this Court held that 'law' means all laws including electricity laws in force in India, and that electricity laws means the Electricity Act, rules and regulations made thereunder and any other law pertaining to electricity. It was in this context that it was observed that the NTP is 'law'. However, to understand the context of the observations, a brief historical background of the amendment to the guidelines witt have to be noted. CERC issued a statutory advice under Section 79(2) of the Act to the Central Government on the impact of domestic coal non-availability and the additional cost of imported coal on tariff. CERC advised that suitable amendments would have to be made to the TBCB Guidelines that were issued under Section 63, the NEP, and NTP. The amendments allow the Appropriate Commissions to take care of the situations arising out of the 'change in policy of the Sovereign Government.' In view of the advice of CERC under Section 79(2), the MoP issued an advisory on 31 July 2013 stating that in view of the shortfall of domestic supply of coal, the cost of imported coal shall be considered for being made a pass through by the Appropriate Commission. Subsequently, in pursuance of the advisory issued by the MoP, the NTP 2016 was amended to include Clause 6.1 providing relief as mentioned in the advisory. The relevant extract is as under:

"6.1 Procurement of power

As stipulated in Para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement electricity separately for base loan requirements and for peak lo requirements. This would facilitate setting up of generatia capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per guidelines dated 19-1-2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In ca of reduced quantity of domestic coal supplied by CIL, vis-à-vis assured quantity or quantity indicated in letter of assurance/FSA cost of imported market based e-auction coal procured for making the shortfall, shall be considered for being made a pass through appropriate Commission on a case-to-case basis, as per advice issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vob dated 31-7-2013."

127. It is pertinent to note that this Court in Energy Watch (supra) did not interpret the phrase 'shall be guided' as it finds plan the Act. This Court dealt with the interpretation of the phrase 'ch in Taw. It was held that the amendment in the NTP 2016 cognizance of the domestic coal shortage was a change in law since it is a statutory policy. There is no doubt that NEP and NTP are statutory policies since they were framed under the provisions of the Act However, the observation in Energy Watchdog (supra) that the NTP H 'law' cannot be held to bind the interpretation of the phrase shall be guided'. Further, it must also be noted that this Court in Energy Watchdog (supra) was dealing specifically with changes due to coal procurement and the amendments in the policies were recommended to be made by the Central Regulatory Commission.

Referring to the judgement in PTC India Ltd (8 Supra) the supreme court held:

128. ***A reading of the judgments of this court in PTC India (supra) and the provisions of the Act indicates that the determination of tariff the framing regulations for the determination of tariff fall within the exclusive domain of the appropriate Commission: Section 61 stipulates that the Appropriate Commission shall specify the terms and conditions' for the determination of tariff, Section 86 provides that one of the functions of the State Commission is to determine tariff for transmission. Section 181 states that the Commission shall make regulations on the terms and conditions for the determination of tariff reus, the regulation and determination of tariff is the function of the Appropriate Commission.***

The apex court further held:

129. While the determination and regulation of tariff falls within the exclusive domain of the Regulatory Commission, it is crucial to note that Sections 61 and 86 stipulate that the Commission shall be guided by the NTP while specifying terms and conditions for determining-tariff. The State Commission while exercising its power to make regulations under Section 181(2)(zd) on the terms and conditions for determination of tariff under Section 61 must conform to the provisions of the Act. Thus, while framing regulations under Section 181(2)(zd), the Commission must be guided by the principles mentioned in Section 61, which includes the NEP and NTP.

*130****. This Court in Reliance Infrastructure (supra) has already held that the NTP is one of the material considerations. The NTP is one of the many guidelines that the Commission must necessarily consider while regulating tariffs. The State and the Central Government only have an advisory role in the regulation of tariffs. The Electricity Regulatory Commissions Act 1998, which was consolidated with other statutes of electricity while enacting the Electricity Act 2003, was enacted to distance the governments from the determination of tariffs. Further, the Act does not seek to centralise the power to regulate tariff with th Centre. One of the objectives of the Act was to provide the "state***

enough flexibility to develop their power sector in the manner they consider appropriate." Thus, since the Appropriate Commission possess full autonomy in the determination and regulation of tariff, the States have been provided flexibility to develop their power". (Emphasis supplied)

The Hon'ble Supreme Court concluded on the same as follows:

"Thus, the appropriate commission possesses full autonomy in the determination and regulation of tariff, and the states have been provided flexibility to develop their power systems for intrastate transmission of electricity. **The NTP 2016 shall be one of the material considerations..."** (Emphasis supplied)

The judgement in ***Tata Power Company Ltd (7 supra)*** clearly dispels any impression, if created by ***Energy Watchdog (3 supra)***, that the National Tariff Policy *per se* binds the Commission. It has been amply clarified that the National Tariff Policy shall be one of the material considerations only. The judgement in ***Maharashtra State Electricity Distribution Company Ltd (6 supra)*** has only followed the ratio in ***Energy watchdog (3 supra)*** on the interpretation of the phrase "Change in Law". In light of the judgement in TATA Power Company Limited (7 supra), there is no need for this Commission to discuss any other case law. No doubt, the clarificatory orders of the MoP sought to limit the CPPs' liability for RPPO; the same would certainly be a material consideration for this Commission while making its Regulations for the future. However, as the obligation is for the past periods, which is already governed by Regulations issued by this Commission, in due exercise of the statutory powers, in the opinion of this Commission, such Clarificatory Orders, despite having

statutory flavor, cannot displace the Regulations already in force. In other words, to act on a Clarificatory Order of the MoP would be to negate the Regulations framed and notified by this Commission. Such a course is not desirable so long as the Regulations continue to be enforced for the Obligated Entities concerned.

In light of the above discussion, Point No. 2 is answered against the petitioner.

For the above-mentioned reasons, the OP fails and is, accordingly, dismissed.

As a sequel to the dismissal of OP, the interim order passed earlier shall stand vacated.

Pronounced on this the 3rd day of September, 2024.

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