TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 13th day of August 2024

PRESENT:

Thin M. Chandrasekar	**…**	**Chairman**
Thiru K.Venkatesan	**…**	**Member**
Thiru B. Mohan	**…**	**Member (Legal)**

D.R.P. No.7 of 2022

M/s. Arkay Energy (Rameswaram) Ltd.,
New No.20/Old No.129,
Chamiers Road, Nandanam,
Chennai – 600 035.

....Petitioner
Adv. Anirudh Krishnan

Vs

1. The Government of Tamil Nadu,
   Represented by Secretary, Energy Department,
   Fort St. George,
   Chennai – 600 009.

2. Tamil Nadu Generation and Distribution
   Corporation Limited (TANGEDCO)
   Rep. by its Chairman cum Managing Director
   144, Anna Salai
   Chennai 600 002.

..... Respondents
Adv. Richardson Wilson

This Dispute Resolution Petition stands preferred by the Petitioner M/s. Arkay Energy (Rameswaram) Limited, with a prayer to-

a) To offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1) and determine the price payable for the energy that was injected during the year 2009-2010 and 2010-2011 into the Tamil Nadu Grid for which payments have not been made by the 2nd Respondent to the tune of Rs.92,10,00,000/- and direct the 2nd respondent herein to make the said payment to the petitioner herein.

b) Pass such other and further orders, as the Commission deems fit and proper in the facts and circumstances of the case.

This Dispute Resolution Petition coming up for final hearing on 18.07.2024 in the presence of Thiru.Anirudh Krishnan, Advocate for the Petitioner and Thiru.Richardson Wilson, Advocate for the Respondent upon hearing the arguments on both sides and on perusal of relevant material records and the matter having stood over for consideration till this date this Commission passes the following.

ORDER

1. Contention of the Petitioner:-

1.1. The Petitioner is a Company incorporated under the Companies Act, 1956 inter alia carrying on business in the generation and sale of electrical energy by using Gas as fuel. The Government of Tamil Nadu, on account of acute shortage of power supply within the State and considering it as a emergency, invoked the power under section 11 of the Electricity Act, 2003 and issued a Notification in G.O Ms. NO.10, Energy (C3) dated 27.2.2009 that in public interest.

a. All power generation units operating in Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load factor (PLF) and

b. All generating stations shall supply all exportable electricity so generated to the State Grid for supply either to Tamil Nadu Electricity Board or to other HT Consumers within the State as per the Regulations Notified in this regard by the Tamil Nadu Electricity Regulatory Commission.

1.2. On account of the direction issued by the Government of Tamil Nadu as stated above, the petitioner herein was bound to keep the generation of electricity in its plant at Valathur Village, Valantharavai (P), Ramnad District at

its maximum capacity and was also bound to supply the energy generated to Tamil Nadu Electricity Board or the HT Consumers which is possible only through the lines of the Tamil Nadu Electricity Board. The open access for supply of energy outside the State was not permitted on account of the issuance of the above said Notification under emergency powers. On account of the same, petitioner herein was supplying the entire energy which was generated to the Tamil Nadu Electricity Board subsequently Tamil Nadu Generation and Distribution Corporation Ltd.

1.3. The petitioner herein had been supplying electricity to the Tamil Nadu Electricity Board / TANGEDCO through Power Trading Corporation Ltd, licensed trader who bought energy from the petitioner and sold the same to the Tamil Nadu Electricity Board / TANGEDCO on back to back basis. For certain period, petitioner had participated in tenders floated by the Tamil Nadu Electricity Board / TANGEDCO and had supplied agreed quantity to them directly. Apart from the energy which was so supplied through PTC or to the Respondents directly, the petitioner in terms of the Government order referred to above, was mandated to keep the generation capacity at the maximum levels and was bound to supply the same to the Grid. Accordingly petitioner has supplied the entire energy which was generated to the Respondents herein. It is

pertinent in this context to state that the electricity is of such nature that it cannot be stored and has got to be supplied and consumed contemporaneously.

1.4. Meter readings maintained for the quantum that was generated and injected by the Petitioner into the lines of the Respondents herein and the same are recorded in the joint meter reading which are conducted periodically.

1.5. The petitioner herein, after the issuance of the Government Order dated 27.2.2009 referred to above addressed a letter dated to the 2nd Respondent - herein requesting the 2nd Respondent to buy the surplus energy capacity generated by the petitioner immediately as per the Government Order or if the said directions were not in force, permit the petitioner to go for inter state open access as the petitioner does not have buyers in Tamil Nadu for the surplus capacity generated.

1.6. The Respondent herein without considering the genuine request, on the contrary appears to have advised the Power Trading Corporation under its letter dated 27.08.2010 to retract the supply of energy to 80% of the contracted quantity. Under such circumstances, petitioner's group company was constrained to write a letter dated 28.8.2010 to the 1st Respondent requesting them to purchase the entire energy generated as per the directions contained in the Government Order through PTC without restrictions and make payments as

per the rates already approved by the Board till such time the government order was revoked.

1.7. Since the said representation of the petitioner was not considered, orders were not passed on the other hand the energy generated and injected by the petitioner into the Grid was being consumed for free by the Electricity Board. Therefore, the petitioner's group company was constrained to file writ petition in W. P No.19955 of 2010 before the Hon'ble High Court, Madras for Writ of Mandamus to direct the 2nd Respondent herein (then the Tamil Nadu Electricity Board) to purchase the maximum available energy generated from the petitioner power plant through the PTC Ltd at the rates already finalized. The said writ petition was disposed of by order dated 5.10.2010 recording the submissions by the Learned Standing Counsel for the Respondent Board that they will consider the claim of the petitioner along with similarly placed power generating companies. This Hon'ble Court was pleased to direct the Respondent to take a decision in that regard within 15 days from the date of receipt of the copy of the said order.

1.8. The petitioner's group company forwarded the copy of the said order to the 2nd Respondent herein under cover of letter dated 9.10.2010 and requested the Respondent to purchase the entire energy generated as per the directions in

the above referred Government Order without restrictions and make payment as per the rates already approved by the Board till such time the Government order was revoked.

1.9. The petitioner sent a reminder in this regard on 20.05.2011 and 31.05.2011.. Even the same did not evoke any response. On the other hand, the Respondent continued to consume the energy which was generated and supplied by the petitioner, but was not making payments for the same, The amounts due and payable by the 2nd Respondent to the petitioner was piling up.

1.10. While so, the Chief Engineer of the 2nd Respondent addressed a letter dated 24.11.2011 to the petitioner stating that Representative of the petitioner may come for a meeting in his office at 15.00 hours on 24.11.2011 to arrive at a consensus on the subject matter. Accordingly the petitioner appeared before the 2nd Respondent herein and the 2nd Respondent requested the petitioner to withdraw the winding up notice which was issued as a committee was specifically formed for the purpose of resolving the dispute. Petitioner immediately stated that they are keeping further steps under the Companies Act in abeyance and they would not initiate the same and insisted for the consensus to be arrived at on receipt of the orders of the committee. The Respondent

informed that the issue will be re-visited for settlement of the same mutually on receipt of orders of the Committee in case the petitioner feels aggrieved.

1.11. The Petitioner reliably understands that the Committee after deliberation has recommended that for the energy that has been injected by the Generators into the grid in excess of the contracted quantum which has been consumed by TANGEDCO, payment of UI (Unscheduled Interchange) charges may be made. However, even after the said minutes of the Meeting, no action was taken by the Respondent herein and hence petitioner requested the 2nd Respondent under letter dated 14.12.2011 to give appointment to meet at the convenient time on 16.12.2011 to resolve the issue. The 1st Respondent herein gave an appointment on 18.1.2012 and pursuant to the discussion petitioner requested the 1stRespondent herein under letter dated 19.1.2012 to settle the issue expeditiously. Petitioner followed up the same with a reminder dated 28.1.2012. Thereafter after waiting for a reasonable time on 9.5.2012 the petitioner again reminded the 2nd Respondent about the minutes of the meeting dated 24.11.2011 and requested the Respondent to take immediate action to settle the issues. Petitioner followed up the same with representations dated 19.05.2012 and 14.12.2012. The 2ndRespondent herein in response to the same, informed the petitioner that the Respondents were in the meticulous

process of collecting the three year payment details from the old records and getting it reconciled with M/s PTC and decision would be taken on successful reconciliation with PTC after disposal of certain petitions which were said to have been filed by the other Generators before the Commission.

1.12. Thereafter on 8.5.2013 petitioner requested the 2nd respondent herein to take an early decision in the long pending issue. The same was followed up with the reminder dated 21.1.2014. The reconciliation of the energy which was supplied every month and payments made between 2009-2010 and 2010-2011 had been completed but still no decision was taken with regard to the claims by the petitioner. Hence petitioner addressed a letter dated 27.10.2014 to the 2nd Respondent herein requesting the 2nd respondent to pay the invoices value arrears along with surcharge payable for the belated payment immediately as the matter was pending for a long time. Petitioner sent reminders for the same on 16.12.2014, 02.02.2015 and 13.2.2015.

1.13. As no action was taken by the Respondent herein on the fervent request made by the petitioner, petitioner addressed the last representation on 2.3.2015 to the 2nd Respondent herein claiming the price payable for the excess energy that was injected during the year 2009-10 and 2010-2011 which was the subject matter, which was referred to the Committee for resolving the dispute. Petitioner

reiterated that the energy had been evacuated to the TNEB Grid and received by the Board and sold to the consumers and revenue was also realized by the Board. The same was taken from the report which appears to have been submitted by the Committee. As such it is a clear case of the energy having been utilized by the Respondent Board and en-cashed by sale to its consumers but payment was not made to the petitioner. Petitioner further states that even the reconciliation which was required had already been completed and there was no further re-conciliation to be made and under such circumstances on 2.2.2015, the Chairman cum Managing Director of the 2nd Respondent had also promised to look into the issue and settle the arrears. Referring to all that and also the fact that the sum of Rs. 92.8 Crores was due and payable to the petitioner as referred to in the earlier letter dated 13.2.2015, petitioner requested the 2nd Respondent herein to arrange payment immediately. The Petitioner respectfully submits that in spite of repeated representations made by the petitioner, the respondents have not considered the same and have not taken any final decision.

1.14. The Petitioner was constrained to file a writ Petition in W.P No.11178 of 2015 before the Hon'ble High Court, Madras praying for a Writ of Mandamus to direct the Respondents herein to consider the representations of the Petitioner

dated 13.2.2015 and 2.3.2015 and release the payments which are due and payable to the Petitioner for the energy which was supplied by the Petitioner to the Respondents within the State of Tamil Nadu pursuant to the Govt Order in G.O Ms. No.10 Energy (C3) Department dated 27.2.2009. The said Writ Petition was disposed of by the Hon'ble High Court by order dt 17.4.2015 directing the 2nd Respondent herein to consider the representations of the Petitioner dated 13.2.2015 and 2.3.2015 and pass orders on the same in accordance with law as expeditiously as possible, in any event, not later than four weeks from the date of receipt of a copy of the said order and communicate the decision taken to the Petitioner.

1.15. Thereafter, there was no hearing given by the 2nd Respondents to the Petitioner and to the shock and surprise of the Petitioner, the 2nd Respondent herein has taken a decision, vide proceedings in Letter NO.CE/PPP/SE/EE-1 (PP)F.IBPL-WP/D:313/15 dt 13.5.2015, rejecting the representations of the Petitioner as devoid of merit and stating that no payment can be made to the Petitioner as requested. The reasons assigned by the 2nd Respondent are that the Government Order in G.O Ms. No 10 Energy (C3) Department dt. 27.2.2009 only mandates that energy should be generated to the maximum and should not

be exported outside the State, but there is no obligation on the part of TANGEDCO to buy the same, the 2nd reason is that as per the Grid Code, the State Transmission Utility which plays a key role in maintaining grid stability is entitled to advise the Generators to reduce the supply or back down the generation. The 3rd reason given by the 2nd Respondent is that there is no privity of contract between the petitioner and the respondents as the supply was made only through M/s PTC Ltd. For the above reasons, the 2nd Respondent came to a conclusion that they are not liable to pay any money to the Petitioner.

1.16. The proceedings of the 2nd Respondent herein dt 13.5.2015 rejecting the representations of the Petitioner and stating that they are not liable to pay any amount to the Petitioner for the energy that has been supplied by Petitioner and received and consumed by TANGEDCO wholly illegal. In any event, the petitioner has been running from pillar to post for receiving compensation for the power supplied and the losses caused during a period when the S.11 orders issued by the State of Tamilnadu were in force. Therefore without prejudice to the challenge to the action of the 2nd Respondent in rejecting the claim for payment, the petitioner is in any event entitled to receive payments under Section 11 (2). The same would not have been required if the 2nd Respondent had effected payment. However in view of the stand now taken, the petitioner

cannot be made a victim of the actions of the Respondents and it is entitled to be compensated. Similar petitions filed by the group companies of the petitioner are also pending before the Commission.

1.17. The Government Order which admittedly has been issued on account of emergency mandates that every Generating Station should maintain the generation at its optimum capacity and should inject the entire energy so generated into the grid. The Govt Order is statutory in force as the source of power is traced to Sec. 11 of the Electricity Act 2003. The Respondent licensee being an instrumentality of State and the Government of Tamil Nadu having exercised powers under Sec.11 of the Electricity Act 2003 and having compelled the Petitioner to generate Electricity and having restrained the Petitioner from injecting the energy generated outside the State, is bound to pay for the energy so generated and supplied by the Petitioner to the grid and received and consumed by TANGEDCO.

1.18. The 2nd respondent has itself noticed that electricity once generated cannot be stored and is simultaneously consumed and there being no denial of the fact that the energy injected by the Petitioner was actually consumed by TANGEDCO and realized the Tariff charges from its respective consumers, the

refusal to pay the petitioner for the said energy amounts to arbitrary exercise of power and an unjust enrichment.

1.19. The reference to the Grid Code and the power of the State Transmission Utility to give instructions for scheduling, back down, reduction of supply are all only academic so far as the present case is concerned since there was no instruction at any point of time by the State Transmission Utility or by the Respondents herein directing the Petitioner or any other Generating Station not to supply energy beyond the contracted quantity or to back down the supply on account of possibility of grid instability.

1.20. Not one occasion of grid instability was pointed out by the Respondents at any point of time on account of the supplies made by the Petitioner. More importantly, the 2nd Respondent at no point of time earlier to the rejection in 2015, denied the liability for payment for the units supplied by the Petitioner above the contracted quantity. The Respondents had only stated that they wanted to reconcile the accounts and arrive at the quantum of energy and the rate at which the price has to be paid for the same. In the present case, the mandate in the Govt Order was hanging on the head of the Petitioner and the Petitioner was bound to generate and inject the power into the grid and the same has been consumed by TANGEDCO without demur and TANGEDCO has

also realized revenue out of the same and hence, TANGEDCO does not have any right to refuse payment for the same. There is no dispute that the State of Tamil Nadu was reeling under acute shortage of power and every unit of energy which was generated and injected into the grid was consumed. Even as per the statement by TANGEDCO in PPAP NO.5 of 2011, it was conceded that they had not implemented the instructions with regard to scheduling as directed in Appeal No.123 of 2010.

1.21. The State of Tamil Nadu is reeling under acute short supply of energy, restrictions and control measures have been forcibly implemented by the Government and the Board on account of shortage of supply. The situation was considered as an emergency by the Government. Hence emergency powers under Section 11 of the Electricity Act 2003 were invoked mandating the petitioner to keep the generation capacity at the maximum level and supply the same energy to the grid. Petitioner was prohibited from selling the energy outside the State on one hand by completing the petitioner to keep the generation capacity at the maximum level and supply the energy to the grid within the State and on the other hand prevented the petitioner from selling the energy outside the State.

1.22. The State Government can only give directions under Section 11 (1) for

operation and maintenance of the generating station in accordance to its directions. The State Commission alone has been empowered under Section 11 (2) of the Electricity Act to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1). Therefore the Commission has to examine the adverse financial impact on the generating company as consequence of the direction of the State Government under Section 11 (1) of the Act by considering the rate that the generator would have got in market for sale of power had there been no Section 11(1) directions, subject to such rate covering the cost of generation. Going by the present stand of the TANGEDCO, the supply of power by the petitioner during the period when Section 11 (1) directions in force was not against a Power Purchase Agreement ('PPA') entered into with it. The State Commission under Section 86(1)(b) of the Electricity Act, 2003 has to regulate the electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from the generating companies through agreements. This is not the case where the generator has supplied power against an agreement with the distribution licensee. Therefore, the principles of determination of generation tariff on cost plus basis under Section 61, 62 and 86(1)(b) of the Act shall not be

applicable for determining the compensation to offset the adverse financial impact of the directions under Section 11 (1) of the Act on a generating company. Further, this issue has also been decided by the Appellate Tribunal in HimatsingkaSeide case that Section 62 will not have any application in the cases where power is supplied under Section 11 (1) directions.

1.23. In the present case the State Government has exercised powers under Section 11 (1) when the State was facing power crisis to direct the generating stations in the State to supply power to the distribution licensees in the State. Under such a condition when other States are also competing for procurement of power from the market, the supply of the required quantum of power cannot be guaranteed. Even if power is available in the market, the source of power generation may be outside the State or the region and there may be transmission constraints in procuring the power. Invoking of Section 11(1) directions has guaranteed the availability of power to the State distribution licensees that too from the power plants located in the State, without any transmission constraint.

1.24. The petitioner's plant was operating as a merchant power plant at the relevant time. It is now well settled by decisions of the Hon'ble APTEL that a merchant power plant does not have any long term PPA for supply of power and

sells power in short term at market rates. The market rate is governed by the supply and demand of power. When the supply is in excess of the demand, the market rates come down. Under such conditions, the merchant power may not be able to sell the power and may have to be shutdown. Thus, a merchant power plant takes the market risk. On the other hand a power plant having a long term PPA with tariff based on cost plus principles under Section 62 of the Electricity Act is assured of recovery of its full expenses with return on investment if it operates the power plant within the operational norms specified by the State Commission and thus, has a low element of risk. Therefore, if a merchant power plant is able to get a favourable rate during the period of high demand, it should not be considered from the narrow angle and has to be viewed from long term perspective of operation of a merchant power plant.

1.25. In this regard offsetting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11 (1) of the Electricity Act, 2003 would mean fixing a rate keeping in view the revenue the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss. Further but, from the order of the State Government to supply power within the

State and the tenders floated by TANGEDCO where supplies were being made through PTC, the petitioner would have sold its power in the market rate and therefore, the adverse financial impact of the directions under Section 11(1) will be the rate that the petitioner would have got in the short term market and minimum rate would be the rate under the tenders for the relevant period for the supply made and its entire capacity.

1.26. It is entitled to receive the payment at the minimum of the contracted rate which it was supplying to PTC for the entire energy that has been pumped. This is especially so since there is no dispute as to the quantum of energy generated and the fact that TANGEDCO utilized the power. At the Committee meeting the minutes also disclose that there was in fact no danger to grid security as is sought to be falsely claimed subsequently. In as much as the TANGEDCO is taking technical defences and is not paying, the Petitioner is entitled to the primary remedy of getting paid by the Government under S.11. In terms of settled law it would be entitled to payment under the then prevailing short term market rate which was in excess of Rs.11. However, the petitioner in order to approach the matter fairly is making a claim only to that extent together with accrued interest. Further the petitioner would submit further details for purposes of the compensation if so required by the Commission.

1.27. As regards its entitlement for interest, it is submitted that the Hon'ble Supreme Court in TANGEDCO v PPN Power Generation Co Ltd Civil Appeal No. 4126 of 2013 has recently adjudicated the issue of payment of interest and the relevant extract has been set out below:

> *"We are also not able to accept the submission of Mr.Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra & Ors. In this judgment it has been held as follows:*
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> *"The essence of interest in the opinion of Lord Wright, in Riches vsWestminster Bank Ltd. All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he. is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High*

Court of Punjab 2002 (1) SCC 367 speaking through Tek Chand, J. in CIT v. Dr Sham LalNarula thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money ... , In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

56. Similar observations have been made by this Court in Indian Council of Enviro-Legal Action vs. Union of India &Ors. wherein it has been held as follows:

"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above-or to simply levelise-a convenient approach is calculating interest. But here interest has to be calculated on compound basis-and not simple-for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound Interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law refonn which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law

Commission to consider and recommend necessary amendments in relevant laws.

57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. Mr. Salve and Mr.Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This can not be said to be unfair as the same principle would also apply to the Appellants"

1.28. The interest is also to be paid from the date of the generation until date.

2. Counter Affidavit filed by the Respondent :

2.1. The DRP deserves to be dismissed in limine for non- joinder of necessary parties and lack of cause of action, as detailed hereinbelow. Further, the present DRP is a proxy litigation being fought by the Petitioner on behalf of PTC since PTC itself cannot claim the sums of money claimed by the Petitioner herein.

2.2. the Petitioner herein claims to have entered into a short-term Power Purchase Agreement (hereinafter referred to as "PPA") with Power Trading Corporation of India Limited (PTC). There is no contract between the Petitioner and TANGEDCO in connection with this case.

2.3. M/s.PTC is a trader in electricity whereas the Petitioner herein is a generator. TANGEDCO 2nd respondent herein) had originally entered into a power purchase agreement (PPA) with the PTC on 21.10.2009 where PTC had agreed to supply power in the range of 325 to 433 MW from generating plants located in Tamil Nadu and Andhra Pradesh from 19.06.2009 till 31.05.2010 by fixing a tariff to Rs.5.94 per kWh. Another agreement dated 25.01.2011 was entered into between PTC and TANGEDCO to extend the supply of power for a period between 26.08.2010 till 31.05.2011.

2.4. In the first PPA dated 21.10.2009 between TANGEDCO and PTC,clause 1 provides that the total quantum of power available for sale by PTC from its various gencos within Tamil Nadu and Andra Pradesh is as per Annexure - I of that agreement. In Annexure –I, Arkay Energy (Petitioner) is found at Sl. No.7. It can be seen from clause 1 that the quantum indicated in Annexure - I is only the available quantum of sale and there is no obligation on TANGEDCO to buy the entire available quantum. In fact, the intention of the parties was that from the available quantum of power, TANGEDCO would schedule the power required by it every month. Clause 5 of the agreement reads as under:

> *"5. Scheduling:*
>
> *TNEB shall schedule" this power in full except in case of transmission constraint as certified by the SLDC of TNEB or under Force Majeure*

conditions. Copy of monthly generation schedule shall be forwarded by PTC to TNEB by 08:00 Hrs of 1st of the every month as per the format annexed herewith

Quantum of power available from cogeneration plants during crushing period using coal as mixed fuel shall be communicated after finalization of methodology of quantum of power produced using coal and bagasse."

Therefore, if TANGEDCO schedules a lower quantum of power, keeping in mind the transmission constraints, only that quantum of power must be supplied by PTC.

2.5. As per the terms of the PPA between PTC and TANGEDCO dated 21.10.2009, Thetariff for the power to be purchased is in clause 2.

2.6. The PPA also contains clauses for non-scheduling of power by TANGEDCO. Under clause 12(ii) of the agreement between PTC and the TANGEDCO dated 21.10.2009, it clearly states that if TANGEDCO is not in need of energy over and above 80% contracted power, then TANGEDCO is not liable to pay for any supply. Clause 12(ii) is extracted hereunder:

"Clause 12. Supply beyond Contracted quantum:

ii) If TNEB is not in need of energy supply over and above Contracted 80% then TNEB is not liable to pay for any oversupply by PTC. However 03 days advance intimation shall be given by TNEB. "

2.7. Similarly, in clause 11, compensation is agreed between TANGEDCO and PTC if TANGEDCO fails to offtake power upto 80% of the contracted energy.

2.8. Similarly in the agreement dated 25.01.2011, clause 5 of the PPA dated 21.10.2009 is retained. In so far as the clauses for non-offtake/ scheduling of power by TANGEDCO, clauses 10 and 11 read as follows:

> *" 1 0. Compensation for Default in Suppy / Offtake:*
> *Without prejudice to the provisions of Force Majeure, PTC has to apply for open access for the quantum as per LOA and if PTC fails to schedule 80% of contracted energy in a month then PTC shall pay compensation to TANGEDCO at the rate of Rs.1.00/kWh to the extent of short fall of 80% of monthly contracted energy. Similarly, if TANGEDCO fails to offtake 80% of the contracted energy in a month then compensation shall be paid by TANGEDCO @ Rs.I.00/kWh to PTC for the shortfall which falls short of 80% of monthly contracted energy.*
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> *11 Modification such as addition/ deletion:*
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> *PTC will stick to the contracted quantum of power for scheduling. There is no liability for payment on TANGEDCO to pay for the excess energy supplied beyond the approved scheduled energy or the contracted energy by PTC on its own accord. "*

Therefore it can be seen that even in the agreement dated 25.01.2011, TANGEDCO has the discretion to schedule a particular quantum of power out of the total available quantum for sale. If TANGEDCO schedules upto 80% of the power, then there is no compensation due to PTC.

2.9. While so, TANGEDCO has sent a letter to PTC vide Lr.No: CE/PPP/DIR/EE/ AEE/PP /F.Purchase-Tender No.2 /D.119 2-1/10 dated 27.08.2010 requesting PTC to restrict the quantum of supply to 80% of the contracted energy against the 100% contracted quantum of 469 MW with effect

from 29.08.2010 sourced from its power generators until further orders. The letter clearly stated that if PTC schedules more than 80% of contracted energy, TNEB will not be liable to pay excess energy. Therefore, it has been made clear to PTC in exercise of the power conferred by the PPA not to supply excess energy into the grid. The said instructions were modified w.e.f. May 2011, after the period of claim in the present petition.

2.10. In the present case is that, contrary to the instructions given by TANGEDCO vide letter dated 27.08.2010, PTC seems to have injected excess energy into the grid. According to the Petitioner, the excess energy was supplied by the Petitioner and therefore, the Petitioner is claiming sums of money for the alleged energy supplied by it to PTC.

2.11. The claim of the Petitioner fails on the following grounds:

a. There is no privity of contract between the Petitioner and TANGEDCO. There is no contractual obligation or any other obligation in law for TANGEDCO to purchase power from the Petitioner.

b. The Petitioner has an agreement only with PTC. If the Petitioner has indeed supplied energy to PTC, its remedy is a claim against PTC.

c. PTC ought not to have injected any power in excess of scheduled power into the grid in terms of its PPA. The PPA clauses are unambiguously

clear that if any energy is supplied by PTC in excess of scheduled power, TANGEDCO is not liable to make payments towards such excess power.

d. Merely because the Petitioner has made a representation to the State Government to purchase the entire power generated by it, does not give it a vested right to supply power and claim monies towards it.

e. The present petition is barred by limitation since the power was supplied between June 09 to May 2011 and the request of the Petitioner for payment was rejected by order dated 02.01.2013 but the present petition was originally presented only on 15.09.2017.

f. The claim of similar gencos were rejected by the Commission in the following cases M/s OPG Power Generators in D.R.P. 1 of 2013 dated 04.01.2019 & other batch cases in DRP No: 20 of 2011, DRP No: 15 of 2011, DRP No:16 of 2011, DRP No: 5 of 2011, DRP No: 2 of 2013, DRP No: 8 of2013, DRP 10 of 2013 & DRP No: 11 of 2013.

2.12. The averments contained in paras 5 & 6 of the petition as false and untrue. The petitioner herein has no contract with TANGEDCO in the present case on hand and cannot claim for supply of power by PTC to TANGEDCO under its PPA. The Petitioner cannot inject unauthorized energy and claim

reimbursement for the same. Approving such an action is perpetuating an illegality which the Commission would not entertain.

2.13. The averments made in paragraphs 8,10,11,12,20,21,24,25 and 26 of the petition are denied as false and untrue.

2.14. The averments mentioned in paragraph 7 are denied as false and untrue. The joint meter reading is only for authentication of quantum of power injected, out of which how much is to be accounted against various power generators under agreements. The petitioner now cannot attribute contractual obligation to the meter reading agency and cannot derive any legal benefit out of a meter reading.

2.15. The averments made in paragraphs 9 and repeated in paras 22 and 23 of the petition are denied as false and untrue. It is to be reiterated again that the petitioner only supplies power to PTC and PTC in turn is obliged to supply power to TANGEDCO only as per the scheduling communicated by TANGEDCO. Any supply in excess of scheduling does not entitle PTCor the Petitioner to payments.

2.16. The averments made in paragraphs 13 to 16 are denied as false and untrue. When TANGEDCO is directing to reduce /back down generation, it means that SLDC has certified certain transmission issues and at that instance

TANGEDCO was unable to absorb the available power in full. Only because of this reason, back down instructions were issued. It is a scientific fact that any utility can absorb the power generation only to an extent of load demand maintaining the frequency within the permissible band (49.90 to 50.05 HZ). When the generation is more than the load demand, the excess injection will go anywhere in an integrated regional grid. Therefore the action of PTC and the Petitioner in refusing to back down generation and injection, when TANGEDCO instructed generators to back down generation had resulted in excess injection and TANGEDCO could not absorb the excess injection practically due to electricity flow.The reference to the committee constituted by

TANGEDCO in the present case is irrelevant since it was a purely internal committee and in any case the committee did not recommend to pay to the petitioner the amount claimed by it nor was any finaldecision taken by the competent authority pursuant to the said committee's deliberations. In any case, by letter dated 02.01.2013 videLr. No. CE/PPP /SE/EE/ AEE / (PP) /F.IBPL Winding up notice /D472/12, and subsequent letter dated 13.05.2015, TANGEDCO has rejected the request of the Petitioner. Therefore, the stand of TANGEDCO has always been that excess energy injected by the petitioner without authorization and consent cannot be reimbursed. Further, PTC has not

raised any dispute on excess injection and therefore, the Petitioner cannot claim more than what PTC has claimed.

2.17. The averments made in paragraphs 17 to 19 are denied as false and untrue.The order dated 17.04.2015 of the Hon'ble High Court was only to consider the Petitioner's representations which were considered and rejected.

2.18. The cases of similarly placed generators seeking for payments for illegal excess injections have been refused by the Commission in DRP No: 5 of 2011, DRP No: 20 of 2011,DRP No: 15 of 2011, DRP No:16 of 2011, DRP No: 1 of 2013, DRP No: 2 of 2013, DRP No: 8 of 2013, DRP 10 of 2013 & DRP No: 11 of 2013 and these orders have not been set aside by the Hon 'ble APTEL.

2.19. The averments made in paragraph 23 are denied as false and untrue. It is submitted that the SLDC is responsible for carrying out the real time operation of the grid through secure and economic manner and for exercising supervision and control over the energy transmitted through the system as per Section 32 of Electricity Act, 2003. Hence SLDC requires the scheduling and dispatch of electricity within the State in accordance with contracts entered into between generating companies and licensees which mean that there shall be no injection of energy without the prior approval of the SLDC which also attracts penal actions and other actions which includes termination of connectivity agreement /

de-linking of grid, etc., through STU/SLDC vide Chapter 10- Non Compliance of TN Electricity Grid Code for non-compliance with SLDC. The generators and the licensees are expected to follow the schedule given by SLDC in the interest of grid security and economic operation and that if the power injected into grid without a schedule, the same will be consumed in the grid even without the knowledge or consent of the distribution licensees. This is why the PPAs with PTC contain clause 5 which state that the scheduling by TANGEDCO is pursuant to a certification of transmission constraints by SLDC.

TANGEDCO cannot schedule electricity contrary to transmission constraints stated by SLDC as per law.

2.20. The averments made in paragraph 27 of the petition is denied as false and untrue. The petitioner had participated in the tender during 2009 -2010 & 2010-11 through M/s. PTC in its own will in short term basis as merchant power plant. So, now the petitioner cannot take a stand that it cannot be viewed from a long term perspective of operation of a merchant power plant.

2.21. The averments and in paragraphs 28 and 29 are denied as false and untrue. TANGEDCO had been paying Rs.5.94 per Kwh (including trading margin 4 paise) during the period from 19th June '2009 to 31stMay'2010 as per the agreement between PTC and TANGEDCO and Rs.4.74 to 6.14 (including

trading margin 7 paise) (average rate of Rs. 5.15 per unit) during the period from 4th June'2010 to 31st May'2011 where the average rate prevailed in market was Rs. 4.50 per unit & Rs.4.51 per unit respectively. Therefore, the respondent was never at default and had been making the payments for the invoices raised by PTC and the payments are made through PTC only.

2.22. The averments made in paragraphs 30, 31 and 32 are denied as false and untrue. The case law cited in paragraph 30 is not relevant to the present case as the issues involved in both the cases are different. When the TANGEDCO itself is not liable to make payments for the unauthorized injection of power made by the petitioner, the question of interest over the said amount will not arise.

2.23. The Petitioner has projected a case as if because of GO Ms. No. 10 dated 27.02.2009, the power generated by it had to be supplied to the grid and the State/ TANGEDCO was refusing to purchase the said power. The intention of G.O. Ms. No. 10 was only to prohibit sale of energy outside Tamil Nadu due to the shortage of power supply and therefore it cannot be construed as a blanket approval to pump unauthorized additional power into the grid. The G.O. Ms. No. 10 has restrained the injection of power outside the state, but allows to supply power to

a. Captive consumers

b. HT consumers within the State

c. TANGEDCO as per the regulations notified by the Commission.

2.24. The said G.O. does not contain any undertaking that TANGEDCO or the State will purchase power from the generating company. The petitioner was also free to sell the excess power to any other HT consumer within the State. Therefore, it is not as if the Petitioner was forced to inject the power into the grid having no other option.

2.25. In the present case, the Petitioner is attempting to enforce a contractual clause between the 2nd Respondent and PTC for purchase of power, for which the Petitioner has no *locus standi*. That apart, the Petitioner is overlooking the fact that the PPA between the 2ndRespondent and PTC contains clauses whereby TANGEDCO can restrict the supply of power by PTC to TANGEDCO. Any injection by PTC contrary to the terms of its PPA is illegal and the Petitioner cannot attempt to recover sums of money from TANGEDCO that PTC itself is not legally entitled to, more so when PTC has not itself claimed said amounts.

2.26. It is well settled that the limitation to file a DRP before the Commission is 3 years from the date of accrual of cause of action. In the present case, power was supplied between June 2009 to May 2011 and the request for payment of

money by the Petitioner was rejected by TANGEDCO on 02.01.2013. Therefore, the filing of the present DRP (originally as a MP) on 15.09.2017 is hopelessly barred by limitation.

2.27. That apart, the non-joinder of PTC, who is a necessary party, as a party Respondent to this case is fatal to the present case. There is no privity or legal obligation between the Petitioner and the 2nd Respondent to supply power. Therefore, when the Petitioner itself is claiming on the strength of PTC's PPA with TANGEDCO, not impleading PTC in the present petition is fatal to the petition.

3. Rejoinder filed on behalf of the petitioner :-

3.1. The Petitioner herein has filed the above Petition seeking relief to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1) of the Electricity Act, 2003 and to determine the price payable for energy that was injected during the year 2009-2010 and 2010-2011 into the Tamil Nadu Grid for which payments have not been made by the 2nd Respondent.

3.2. The above Petition dated 15.09.2017 filed by the Petitioner herein may be read as part and parcel of the present Rejoinder to avoid repetition and, for the sake of brevity, the contents therein are not reiterated once again. The Petitioner and the Respondents are collectively referred to as "Parties" for the sake of convenience and clarity.

3.3. The contentions raised by the Respondents in the Counter Affidavit dated 05.04.2023 filed before the Commission are denied *in toto*, except those which are admitted specifically. The Petitioner in response to such averments of the Respondents, files the present Rejoinder to bring before the Commission, the entire background in relation to the subject claim under the present Petition.

3.4. The issue at hand pertains to supply of electricity during the period between 2009 and 2011, when the State of Tamil Nadu was facing acute shortage and consequent high demand for electricity. It was in these circumstances, that the Government of Tamil Nadu, the 1st Respondent herein had issued a Notification bearing G.O. Ms. No. 10 dated 27.02.2009, through which all power generators in the State of Tamil Nadu were directed to generate power at their maximum capacity and supply all exportable electricity so generated to the State Grid.

3.5. At this juncture, the Petitioner entered into a Power Purchase Agreement dated 06.04.2009 with one Power Trading Corporation India Limited ("PTC"), whereunder it was agreed between the parties therein that the Petitioner shall supply power from its gas-based Plant on the following basis at the rate of Rs.6.66/kWh:

a. 15 MW power for the period from 06.04.2009 (20.30 hrs) to 14.04.2009 (06.00 hrs);

b. 5 MW power for the period from 14.04.2009 (06.00 hrs) to 31.05.2009 (24.00 hrs).

3.6. Thereafter, the said PTC issued a Letter dated 19.06.2009 to the Petitioner herein requesting for scheduling of power from the Petitioner's plant to Tamil Nadu Electricity Board (TNEB) with immediate effect at Rs.5.90/kWh till May, 2010. However, the said PTC vide its subsequent Letter dated 04.07.2009 directed the Petitioner to schedule power to TNEB through PTC till 31.05.2010. Consequently, a Supplementary Agreement dated 22.10.2009 was entered into between the Petitioner and the said PTC, extending the contractualarrangement for the period from June, 2009 up to May, 2010, with a few amendments in respect to the tariff rate as Rs.5.90/kWh, compensation clause, supply beyond

contracted quantum clause, clause dealing with a situation if TNEB purchases lesser thanthe contracted energy etc.

3.7. Since the situation in the State did not improve till March, 2010, the said PTC once again approached the Petitioner requesting to sell additional power of 30 MW to TNEB through PTC from April, 2010 to May, 2010 at a tariff rate of Rs.5.78/kWh. The Petitioner in accordance with the said arrangement, supplied power to TNEB through PTC till May, 2010.

3.8. However, the situation of demand for electricity remained the same. The said PTC vide its Letter dated 03.07.2010 approached the Petitioner to continue the supply of power to the tune of 80 MW from its plant situated at Valathur, Ramnad to TNEB through PTC from 04.07.2010 till the finalization of TNEB tender at a tariff rate. Consequently, the said PTC also addressed a Letter dated 19.07.2010 to the then Chairman, TNEB reconfirming that the rate of Rs.4.74/kWH for supply of power to TNEB for the period from June, 2010 to September, 2010 and requested for issuance of LoI.

3.9. Subsequently, TNEB issued a Letter of Acceptance dated 19.08.2010 to PTC for purchase of Round the Clock (RTC) power from CPPs/Generators in Tamil Nadu as mentioned in the Annexure thereto. The Petitioner was included in the said list of CPPs/Generators. The period of supply of power was from

August, 2010 to May, 2011. Along with the said LoA, TNEB also annexed the terms and conditions of Agreement to be entered into with Generators. Consequently, the said PTC addressed a Letter dated 23.08.2010 to the Petitioner herein informing that power shall be scheduled to TNEB through PTC from 24.08.2010 to 31.05.2011 on the said quantum and tariff:

3.10. However, by virtue of a Letter dated 26.08.2010, the said PTC amended the quantum of power for the months of October, 2010 - December, 2010 to 68 MW, 77 MW and 76.5 MW respectively. It was at this juncture that the said TNEB vide a Letter dated 27.08.2010 instructed PTC to restrict the quantum of supply to 80% of the contracted energy against 100% contracted quantum with effect from 29.08.2010. Despite the abovesaid instructions, the said PTC by a Letter dated 21.09.2010 to the Petitioner herein increased the quantum of power for the month of October, 2010 by amending the quantum from 68 MW to 71 MW.

3.11. One of the sister concerns of the Petitioner Company viz., M/s. Ind-Barath Powergencom Ltd., approached the Hon'ble High Court, Madras in Writ Petition No. 19955 of 2010 for a direction to the Respondents therein to purchase the maximum available energy generated. By an Order dated 05.10.2010, the Hon'ble Court was pleased to direct the said TNEB to consider

the representation made taking into consideration the aforesaid Government Order.

3.12. On the other hand, on 28.12.2010 the said PTC addressed a Letter intimating of the shortfall in quantum of power for the months of January, 2011 to May, 2011 and reducing the contracted quantum.

3.13. The said TNEB vide a Letter dated 07.05.2011 addressed to PTC instructed CPP Generators in the State of Tamil to maintain 60% of the contracted quantum of power with effect from 07.05.2011. In reply to such instructions, the Petitioner by its Letter dated 20.05.2011 intimated the then Chairman of TANGEDCO that the said instructions are not in line of the above said Order dated 05.10.2010 passed by the Hon'ble High Court, despite the fact that the Department was directed to consider the request to purchase maximum power generated by the Generators in the State. Accordingly, the Petitioner herein requested the addressee to comply with the Order passed by the Hon'ble Court and intimated that the Petitioner shall be pumping the entire energy generated into the Grid.

3.14. The Petitioner supplied its entire power generated from its Valathur Plant to TNEB through PTC and the same was accepted by TNEB without any whisper on the quantum of energy being generated and injected into the Grid

either by PTC or by the said TNEB. The same is evident from the Joint Meter Readings taken from time to time i.e., from 19.06.2009 to 31.05.2010 and thereafter from 01.06.2010 to 31.05.2011. The Petitioner also addressed a Letter dated 31.05.2011 to TANGEDCO, the 2nd Respondent herein intimating that the Petitioner has been supplying power by maintaining maximum capacity to it through the said PTC and also assured that the Petitioner shall continue to operate at maximum capacity and supply the same to the 2nd Respondent in future also. The Petitioner pursuant to the said supply made, had raised various invoices on the said PTC, for payment towards the supply of power to TNEB through it. Admittedly, the said PTC had partially honored the invoices raised by the Petitioner. However, the remaining portion of the invoices are still due and payable to the Petitioner.

3.15. Since, no payments were coming forth despite various demands and requests and despite the quantum of power generated and injected into the Grid by the Petitioner was and is never disputed by the Respondents till date. Further, it is submitted that the Petitioner has been in contractual arrangement with Gas Authority of India Ltd., (GAIL) for supply of gas to it. Given the instructions issued by the 2nd Respondent, the Petitioner would not have been in position to off-take the minimum quantum of gas, resulting in breach and facing

penalty charges by GAIL. It is pertinent to state that the commodity involved in the case at hand is electricity, which cannot be stored for future consumption.

3.16. In these circumstances, the Petitioner was constrained to issue a Legal Notice dated 13.10.2011, narrating the entire facts and stating that the Petitioner generated maximum power and injected the same into the State's Grid only upon the direction imposed by virtue of G.O. (Ms.) No.10 dated 27.02.2009 and called upon the 2nd Respondent herein to pay a sum of Rs.92,09,69,215/- within 21 days. It was also informed that necessary legal action including proceedings for winding up against the 2nd Respondent would be initiated should the payments not be made. Though the Respondents received the above said Notice, responded with a Letter dated 24.11.2011, inviting the Petitioner's representative for a meeting at its office at 3:00 PM on the same day to arrive at a consensus on the subject matter.

3.17. The Petitioner accepted the 2nd Respondent's invitation and participated in the meeting held on 24.11.2011 at 3:00 PM at the office of the 2nd Respondent. The 2nd Respondent during the meeting requested the Petitioner to withdraw the above said Notice dated 13.10.2011, which the Petitioner refused. The Petitioner suggested that the said Notice shall be kept in abeyance until further orders of the Committee with a request to resolve the disputes. The

minutes of the said Meeting was recorded and duly signed by the representatives of the Petitioner and also of the 2ndRespondent (TANGEDCO). The relevant portion of the said Minutes is extracted hereunder for ready reference:

> *"The Company representatives have submitted that they are not in position to withdraw the notice and suggested to keep the same in abeyance until further orders of the Committee with a request to resolve the disputes at an earliest. They specifically insisted that this consensus is without prejudice to the right to proceed on receipt of the orders of the Committee in case they are aggrieved. TANGEDCO informed that the issue will be revised for settlement of the same mutually on receipt of orders of the Committee in case the companies feels aggrieved. "*

3.18. As such, the said Meeting was concluded on the note that the 2ndRespondent shall revisit on settlement upon receipt of orders of the Committee.

3.19. The Petitioner in a bonafide belief that the Committee of the 2ndRespondent would look into the issue raised by the Petitioner and pass appropriate Order/Report, waited for more than two (2) months. Thereafter, the Petitioner seeing no response from the 2nd Respondent or its Committee, approached the 2nd Respondent on 18.01.2012 and addressed a Letter dated 19.01.2012 and 28.01.2012, requesting the 2nd Respondent to settle the issue at the earliest.

3.20. Since no action was taken by the 2nd Respondent pursuant to the Meeting held on 24.11.2011, the Petitioner vide Letter dated 16.02.2012 requested the 2nd Respondent to pay a sum of Rs.92.09 Crores to the. Petitioner. Thereafter, seeing no reply from the 2nd Respondent, the Petitioner made similar requests on 09.05.2011, 14.12.2012. The 2nd Respondent vide its Letter dated 02.01.2013, for the very first time, refuted the claims of the Petitioner on the ground that there was no direct contract / privity between the Petitioner and the 2nd Respondent; that dispute regarding pending payment, excess energy and shortfall in energy have to be settled by PTC; that the 2nd Respondent had requested PTC to reconcile the energy scheduling for the period 2009-2010 and 2010-2011 and that the same was under process. By such response, the 2nd Respondent informed the Petitioner that it cannot take any decision and that the claims of the Petitioner may be considered only after successful reconciliation with PTC and after disposal of petitions before TNERC.

3.21. The Petitioner caused a detailed reply to the above said communication of the 2nd Respondent and requested for early reconciliation with PTC and arrangement of payment of the long pending dues vide Letters dated 08.05.2013, 04.12.2013, 21.01.2014, 27.10.2014, 16.12.2014, 02.02.2015, 13.02.2015 and 02.03.2015. Since, the 2nd Respondent turned deaf ears to

various aforesaid representations addressed to it by the Petitioner, the Petitioner was constrained to approach the Hon'ble High Court, Madras in W.P. No. 11178 of 2015, seeking a direction against the 2nd Respondent herein to consider the Representation dated 13.02.2015 of the Petitioner and release payments which are due and payable to the Petitioner for the energy which was supplied to the 2nd Respondent pursuant to the said G.O. (Ms.) No.10.

3.22. The Hon'ble Court after hearing submissions on either sides, was pleased to pass an Order dated 17.04.2015, directing the 2nd Respondent herein to consider the representation and pass orders on the same in accordance with law as expeditiously as possible, within four (4) weeks.

3.23. The 2nd Respondent vide a Letter dated 13.05.2015, on similar grounds as stated in its earlier communication dated 02.01.2013, rejected the claim of the Petitioner as devoid of merits. It was against this rejection that the Petitioner approached the Commission in the present Petition.

3.24. Pursuant to filing of the present Petition on 15.09.2017, the Petitioner and the 2nd Respondent herein along with two (2) other sister concerns of the Petitioner's Group Company, entered into a Memorandum of Settlement dated 24.05.2018 before the Hon'ble National Company Law Appellate Tribunal, New Delhi, whereby the parties agreed to reconcile the pending issue between them

at the earliest to settle the various long pending dues payable by the 2nd Respondent.

3.25. Despite multiple rounds of reconciliation between the Petitioner and the 2nd Respondent on several occasions i.e., 11.03.2019, 19.07.2019, 30.08.2019, 04.01.2020, 12.09.2020, 24.09.2020 and finally on 25.09.2020, the same did not fructify into a successful settlement.

3.26. On failure of the reconciliation, the Petitioner took steps to pursue its remedy for various claims against the 2nd Respondent herein, one such is the present Petition. It was at this juncture that the Report of Committee of the 2nd Respondent dated 02.01.2013, was brought to light through a reply dated 04.01.2021 to RTI Application dated 10.12.2020. Under the said Report it had been categorically observed that since "the said generators had already injected power into the Grid, which was in turn sold by TANGEDCO to its consumers but the generators seek payment for such injected energy". The said Report further observed that power supplied in compliance to the said G.O. (Ms.) No. 10, the generators cannot be left remediless and since the 2nd Respondent is not empowered to fix tariff, the generators can approach this Hon'ble Tribunal to offset the adverse financial impact including the tariff for the energy injected.

3.27. The 2nd Respondent has suppressed the very existence of such a Report of the Committee of the 2nd Respondent till date and has acted in malafide manner to cause hardship and financial stress to the Petitioner. The said acts of the 2nd Respondent are nothing but to deprive the Petitioner of its legitimate dues for the supplies made by it to the 2nd Respondent during the hard times of electricity crises in the State of Tamil Nadu.

3.28. Sum and substance of the contentions of the Respondents raised in its Counter are as follows:

" 13. I humbly submit that the claim of the Petitioner fails on the following grounds:

a. There is no privity of contract between the Petitioner and TANGEDCO. There is no contractual obligation or any other obligation in law for TANGEDCO to purchase power from the Petitioner.

b. The Petitioner has an agreement only with PTC. If the Petitioner has indeed supplied energy to PTC, its remedy is a claim against PTC.

c. PTC ought not to have injected any power in excess of scheduled power into the grid in terms of its PPA. The PPA clauses are unambiguously clear that if any energy is supplied by PTC in excess of scheduled power, TANGEDCO is not liable to make payment towards such excess power.

d. Merely because the Petitioner has made representation to the State Government to purchase the entire power generated by it, does not give it a vested right to supply power and claim monies towards it.

e. The present Petition is barred by limitation since the power was supplied between June 09 to May 2011 and the request of the Petitioner for payment was rejected by order dated 02.01.2013 but the present petition was originally presented only on 15.09.2017.

f. The claim of similar gencos were rejected by the Commission in the following cases M/s.OPG Power Generators in D.R.P. 1 of 2013 dated 04.01.2019 & other batch cases in DRP No:20 of 2011, DRP No: 15 of 2011, DRP No:16 of 2011, DRP No:5 of 2011, DRP No:2 of 2013, DRP No:8 of 013, DRP 10 of 2013 & DRP No:11 of 2013.

3.29. The 2nd Respondent even in its Counter Statement filed in the present Petition has not disclosed the existence of the Report dated 02.01.2013 of the Committee. Therefore, the malicious intent of the 2nd Respondent towards the Petitioner herein is evident.

3.30. The 2nd Respondent has on one hand unjustly enriched itself by selling/ consuming the entire power injected by the Petitioner to the Grid while on the other hand, rejected the claim of the Petitioner for the payment of dues towards

supply of power in the year 2009-2010 and 2010-2011 in compliance to the said Government Order.

3.31. The contention of the 2nd Respondent that there is no privity of contract between the Petitioner and the 2nd Respondent is baseless and only an afterthought to escape from its liability. In the instant case since the 2nd Respondent has made unjust enrichment from and out of the power supplied to it by the Petitioner under the said Government Order. Admittedly, as per the Report dated 02.0l.2013, the 2nd Respondent had sold the entire power injected into the Grid to its Consumers and that the claims of the Petitioner under the present Petition pertain to payment of such injection made by it to the 2nd Respondent.

3.32. The 2nd Respondent having accepted the entire power injected, sold the power to its consumers and earned profits out of selling the entire power, cannot escape from its liability by pointing fingers to PTC for the present claims of the Petitioner. The said PTC had already paid the Petitioner for the supplied made under the various contracts entered between the Petitioner and the said PTC. It would not be out of place to mention at this juncture that the Petitioner was bound to generate power at maximum capacity as statutory directions imposed by the 1st Respondent herein vide G.O. (Ms.) No.10.

3.33. The contention of the 2nd Respondent that the claims under the present Petition are barred by limitation is unstainable. The claims of the Petitioner under the present Petition arises out of the supplies made during the period of 2009- 2010 and 2010-2011 and the issues in relation to the said supply had been discussed between the Parties on various dates and the same is evident by the correspondences exchanged between the parties from 13.10.2011 till the Letter dated 13.05.2015 whereby the 2nd Respondent rejects the claims of the Petitioner. Taking into consideration the said Letter dated 13.05.2015. The present Petition has been preferred within limitation. Even otherwise, the Parties had undergone reconciliation process till 25.09.2020 to settle the various issues of long pending dues to the Petitioner payable by the 2nd Respondent, the present Petition was represented well within time. Needless to state that the Commission has vide Order dated 01.03.2022, condoned the delay in representation as well. Hence, the present Petition is well within limitation.

3.34. Thirdly, the contention of the 2nd Respondent that the Commission in other matters of similarly placed generators had rejected the claims for excess injection during the period 2009-2010 and 2010-2011 and that the present Petition may be treated the same is untenable. The case at hand and those cited by the Respondent are differentiable on the basis of the Minutes of

Meeting dated 24.11.2011 between the Petitioner and the 2nd Respondent, followed by the Report dated 02.01.2013 of the Committee of the 2nd Respondent. It is submitted that all the cases referred to by the 2nd Respondent has no such Report being involved, where the Committee of the 2nd Respondent itself admits that the generators ought to be paid for the injection made by them to the Grid of the 2nd Respondent. It is submitted that the said Report of the Committee is the sole basis on which the 2nd Respondent ought to be held liable to offset the financial impact of the Petitioner for the supplies made during the period 2009-2010 and 2010-2011 based on the tariff determined by the Commission.

3.35. Having set out the rejoinder of the Petitioner to the various issues pointed out by the Respondents, the Petitioner is not setting out its responses in the form of paragraph-wise rebuttals in order to avoid repetition and for the sake of brevity. This ought not to be considered as admissions on the part of the Petitioner. At the risk of repetition, is reiterated that the entire contents of the objections filed by the Respondents is denied by the Petitioner except those that have specifically been admitted hereinabove.

4. Issues for consideration :-

On a careful consideration of rival submissions, the principal issues which arise for consideration are as follows:-

1) Whether the PPA signed by the petitioner with PTC and the PSA signed by TANGEDCO & PTC are back to back contracts and whether there exists any privity of contract between the petitioner and TANGEDCO ?
2) Whether the arguments of the petitioner that its relationship with TANGEDCO is not a contractual one but a statutory one created by virtue of Section 11 of the Act can be said to be correct ?
3) Whether the contention of the petitioner that it was compelled to inject power in view of G.O.Ms.No.10 is in itself sufficient to grant relief to the petitioner?
4) Whether the contention of the petitioner that the provisions adumbrated in Section 11 of the Act for offsetting the adverse financial impact would prevail over any other provision in the Grid Code especially the power of SLDC to issue back down instructions thereby entitling the petitioner to seek compensation under Section 11 is sustainable ?
5) Whether the contention of the petitioner that even if Section 11 of the Electricity Act 2003 and the G.O.Ms. No.10 dated 27.02.2009 issued

there under would not prevail over the Grid Code, the petitioner is entitled to be compensated as per the principles of undue enrichment and legitimate expectation under Section 70 & 72 of Indian Contract Act is tenable ?

6) Whether the report of the Internal Committee of TANGEDCO can be taken to be the sole basis for offsetting the financial impact to the petitioner for the period 2009-2010 as sought to be canvassed by the petitioner ?
7) Whether the non-joinder of PTC as a party is fatal to the case of the petitioner ?
8) Whether the contention of the respondent that PTC ought not to have injected energy in excess of the scheduled power in terms of the PPA and that such injection made over and above the same is not liable to be paid is valid ?
9) Whether the petitioner is entitled to any relief ? If so to what extent?

5. Findings of the Commission on first issue :-

It is the contention of the petitioner that the PPA signed by the Petitioner with PTC and PSA signed by TANGEDCO with PTC are back to back contracts

and hence TANGEDCO is liable to pay the disputed amount of claim. This stand taken by the petitioner directly brings up the question of privity of contract between petitioner and TANGEDCO and whether there exists privity of contract between the two is the first question to be addressed by us in the present order before proceeding to discuss the other issues. The Senior Counsel for the respondent drew our reference to the earlier decisions of the Commission in D.R.P.No.5 of 2011 in the matter of M/s. Saheli Export Private Limited, D.R.P.No.15 of 2011 in the matter of M/s.Terra Energy limited and M/s.Shri Ambiga Sugars Limited Vs. TANGEDCO and D.R.P.No.20 of 2011 in the matter of M/s.MMS Steel and Power Private Limited and argued with aplomb that the issue raised herein has already been settled in the said cases and hence no longer *res integra* . The Senior Counsel for TANGEDCO further strenuously contended in his inimitable style that the entire case is liable to be dismissed as each and every contention and claim raised herein have been already considered in those cases and nothing survives for adjudication in the present petition. In this connection we would like to refer to the order of this Commission in D.R.P.No.5 of 2011 first. The relevant portions in the said case in regard to the findings on privity of contract in cases where there are independent

contracts between a generator and PTC on the one hand and TANGEDCO and PTC on the other hand are reproduced below.

> *14.2. FINDINGS OF THE COMMISSION ON THE FIRST ISSUE*
> *In order to answer the first issue, it is necessary to understand what is meant by Privity of Contract. The principle underlying the term 'Privity of Contract' is that only the parties to contract or agreement can bring up a suit against the other party for damages or seek enforcement of contract/agreement and a stranger to contract cannot sue or seek to enforce a contract. In order to establish that there is a contractual relationship, there must be offer and acceptance. These essential requirements of contract have to be present in a contract as rightly contended by TANGEDCO. There is no element of offer and acceptance in the present case . In view of the same, we are of the considered view that there is no privity of contract between the petitioner and the respondent and the essential elements of a valid contract such as offer and acceptance which are sine qua non for bringing about a petition before the Commission are not present The legal position in this regard has been well settled and a stranger to a contract cannot bring up a suit for enforcement of contract.. However, for the better appreciation of the issue on hand, it is necessary to see whether there exists any privity of contract between the petitioner and TANGEDCO. On perusal of the documentary evidences produced before the Commission, the petitioner has entered into contract only with the Power Trading Corporation of India and there is no contractual relationship between TNEB and the petitioner herein. It is the contention of the petitioner that though there is no contractual relationship between it and the TNEB, TNEB was issuing directions to reduce the off take of power on several occasions and also denied open access and TNEB had control over the contract and exercised the same to the detriment of the petitioner. In our view, this does not seem to be a sound argument for the reason that these factors are hardly sufficient to prove the existence of contractual relationship between TANGEDCO and the petitioner herein. Further, in order to bring up a dispute resolution before the Commission, there must be a dispute arising out of the agreement between the parties. A dispute with a third party or stranger to the agreement between a generator and a licensee cannot be the subject matter of dispute resolution whatever may be the*

effect of the actions of such party on the affairs of the parties to a case. In the result, the issue is answered in favour of the respondent. However, we are bound to consider the other issues raised by the petitioner apart from the privity of contract such as the direction of the Government of TN to all the generating stations to export all the exportable energy to the State Grid during R & C Measures and accordingly, we proceed to discuss those issues as well.

It is may be seen from the above findings that in order to bring up a dispute resolution before the Commission, there must be a dispute arising out of the agreement between the parties and such agreement should be the essential part of the Dispute Resolution Petition.

A third party or a stanger to an agreement between a generator and licensee cannot move the Commission for Dispute Resolution. It also follows equally that a generator being a third party has no *locus standi* to make a claim in respect of an agreement entered between PTC and TANGEDCO which is not a back to back contract though ultimate recipient of power is the licensee. The same view stand reiterated in the matter of M/s.Terra Energy Limited and another Vs. TANGEDCO in D.R.P.No.15 of 2011. The relevant portions of the said order are reproduced for better appreciation of the issue before us.

10.9. The first issue is necessitated to see whether the short supply of power from the first petitioner's plant at A.Chittur which was made good from its own other plant and the plant of the second petitioner which is a sister concern is permissible within the scheme of the PPA entered between the petitioners and the first respondent on the one hand and the first respondent and the fourth respondent on the other hand. Therefore,

in order to resolve the issue, it is necessary to see whether the PPAs and PSA in the instant case are back to back contracts and whether the said agreements satisfy the requirements laid down by the Hon'ble Tribunal.

10.10. The said issue is no longer res integra and has been well settled by the Hon'ble Appellate Tribunal for Electricity in Appeal Nos. 15 & 52 of 2011. In order to appreciate the facts of the case better it is necessary to re-produce the following portions of the judgment of the APTEL in the said case also.

"38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that PPA is linked to the PSA. Those clauses are reproduced herein:

"(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.

(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement".

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

40. As indicated above, the purchaser in the present case namely the Haryana Power (R-2) has been specifically identified before the execution of the final PSA and the said information was conveyed to the Appellant by PTC (R-3) through its letter dated 28.7.2006. It was only thereafter, that an amended PPA was executed between

the PTC (R-3) and the Appellant on 18.9.2006 whereby a new article bearing No.16.6.5 was added. Under this amendment, the PTC may assign its right and transfer its obligations under the PPA to the Purchaser namely Haryana Power (R-2)

10.11. It may be seen from the observations of the Tribunal, the basic criteria for terming two independent contracts into back to back contracts are that a) the distribution licensee should be the ultimate recipient and b) the PPA should form an integral part of PSA. The mere identification of the buyer is not sufficient but the PPA should be an integral part of PSA. The Trader has to assign the rights and obligations arising out its agreement with the generators to the distribution licensee. Though references have been made to TANGEDCO in the PPA and TANGEDCO is the ultimate recipient, rights and obligations arising out the PPA have not been assigned by PTC to the distribution licensee. Hence, the fourth respondent herein cannot seek to pass on the liability alone to TANGEDCO without corresponding rights accruing under the PPA,. .

10.12. In other words, the simple test in determining back to back nature of contracts was whether there was any mention in the PPA as to the PSA and whether the performance of the terms and conditions of PPA are dependent on performance of terms and conditions of the PSA.

10.13. In the case decided by the Tribunal referred herein, there were clear recitals in the PPA and PSA to the effect that PPA and PSA are back to back contracts and based on the same the distribution licensee was seeking to enforce the same.

10.14. However, the facts in the present case are different. A bare reading of the PPA and the PSA does not lend any credence to the contention that both agreements are back to back in nature. We do not see even any slightest reference in the PPA as to the likelihood of execution of a back to back agreement in the form of PSA leave alone make them integral part of the other. The PTC has not passed on the rights and liabilities arising out of its agreement with generators to the TANGEDCO in the PSA and there is no explicit mention about the same in the PSA.

10.15. Though it cannot be disputed that the ultimate recipient of power is the distribution licensee, TANGEDCO, the intention of the parties to make the agreements back to back has to be ascertained only with

reference to the express intention prevailing at the time of execution of the agreements and not thereafter.

10.16. In order to satisfy the requirements of back to back contracts, the basic requirement as may be seen from the judgment of the Tribunal, is the fundamental document on which the PSA ought to have been approved should have been the PPA or vice versa i.e, the PPA should have been the integral part of PSA or the rights and liabilities of the parties arising out of the PPA should have been made an integral part of PSA and the performance under the PSA should have been made subject to the performance of the parties under the PPA.. There does not seem to be any such back to back clauses in the PSA.

10.17. The fact that the distribution licensee is the ultimate recipient of power cannot be pleaded at this stage when there was no express intention to make the distribution licensee a party to the agreement. Except for the fact that there are clauses to the effect that a) PTC has been established with the objective of carrying on business of purpose of all electrical power from IPPs, CPPs and other Generating companies, SEBs etc for sale to SEBs, Power distribution companies , other organisation and bulk consumers and abroad and that tariff shall be as agreed and finalised between PTC and TNEB in consultation with SASL, there is no other clause which is explicit enough to make the TANGEDCO liable in respect of the clauses under the PPA. Therefore, there is nothing on record to suggest even remotely that the PPA and PSAs are interconnected and inextricably linked so as to invoke the doctrine of privity of contract.

10.18. The PPA between the individual generators and the PSA between TANGEDCO and PTC cannot be said to be back-back-contracts going by the recitals of the agreements. Therefore, in the absence of any material evidence as to the passing of the risk to TANGEDCO in this regard, we are to unable to agree to the contention that the contract between the petitioners and the PTC on the one hand and the contract between the PTC and the TANGEDCO on the other hand are back to back contracts.

10.19. Having said that, let us see whether there is any mutual consent among all parties in principal at least with regard to acceptance of power from alternate sources. We have to say that though the fourth

respondent had no serious objection for acceptance of power from alternative sources, it is seen that the first respondent had objections to the same and at no point of time there was direct or tacit acceptance from the 1st respondent for supply from alternative sources. The first respondent went to the extent of saying in the counter that the power injected was unrequisitioned. This contention cannot be ignored and has to be seen in the light of the fact that there is always practical difficulties in acceptance of power from difference sources and hence, merely because the overall supply was adhered to , it cannot be said that the energy injected can be paid for by the first respondent. The issue is not as simple as payment for the energy supplied alone. It is to be seen from the angle of security of the grid and whether the energy so supplied can be effectively utilised for the purpose for which it was intended. If the point of injection is as per the PPA, the petitioner may have a case to sustain and surely that is not the case here.

10.20. Despite all these, the single point which weighs in favour of the petitioner is that the injection was done with the approval of the 4th respondent PTC with which the petitioner was having agreement and in the absence of any indication that PTC objected to such injection, the injection from alternate sources cannot be said to be illegal.

It may be noted that the simple test which was done by the Commission in determination of the back to back contract was whether there was any mention in the PPA as to the PSA and whether the performance of the terms and conditions in the PPA are dependent on the performance of terms and conditions of the PSA. Placing reliance on the decision of the Hon'ble APTEL in Appeal No.15 & 52 of 2011, the Commission decided the issue to the effect that in the absence of any material evidence as to the assigning of the rights and liabilities to the TANGEDCO in the PPA entered into between the generator and PTC, the contention of the petitioner that the contract between a generator and

PTC on the one hand and the contract between the PTC and TANGEDCO on the other hand are back to back contracts cannot be accepted.

In view of the aforesaid categorical decision of the Commission, we find there is nothing to adjudicate on this issue and the issue is covered by the earlier decisions cited herein. In the result, the issue is decided in favour of respondent insofar as the privity of contract is concerned. However, we cannot straight away hold at this stage that the entire claim is not maintainable and that all the issues raised herein are covered by those decisions as sought to be canvassed by the respondent. It is because, we find that certain other issues which have been brought up by the petitioner are distinct from the ones in the earlier decisions and accordingly we proceed to decide the rest of the issues and answer them in the succeeding paragraphs.

6. Findings of the Commission on second issue :-

6.1. The petitioner has advanced a new argument to the effect that its relationship with TANGEDCO is not a contractual one but one created by virtue of Section 11 of the Electricity Act, 2003.

6.2. As seen from para 10 of the notes on submission filed by the petitioner, this specific ground has been taken to sustain the present case to give a fresh lease of life to the privity of contract which was rejected in the earlier decisions.

At the first blush, the contention looks fanciful but we cannot agree to the said proposition for the reason that Section 86 (1) (f) under which the PPA entered between the parties cannot be permitted to be watered down by mere invocation of section 11 by the petitioner. It is true that Section 11 is a distinct provision and operates in an independent sphere but the offsetting of the adverse impact is an entirely different function mandated on the Commission as compared to dispute resolution under Section 86(1)(f). In our view, the argument of the petitioner that the relationship between the petitioner and the second respondent TANGEDCO is created by virtue of Section 11 of the Act and is not contractual in nature is absolutely misplaced and cannot be accepted by any stretch of imagination. If that be so, the very existence of the PPA and its provision would become irrelevant in all cases concerning Section 11. In fact, we hasten to add that the proposition so put forward by the petitioner is so dangerous that it would render the PPA redundant. Not only that, it would render the sprit of Section 86(1)(f) otiose in cases where Section 11 is invoked.

6.3. Be that as it may, a bare reading of Section 11 of the Electricity Act, 2003 would make it pellucid and crystal clear that no relationship has been created between the petitioner and the respondent licensee as the said provision is totally silent on who should offset the adverse impact. It only empowers the

Appropriate Govt to issues directions in public interest. This is only to state that even considering the argument of the petitioner for a moment for exclusion of 86(1)(f) altogether and to resort Section 11 for the deciding the issue, still it must be said that the petitioner has no case for the simple reason that the phraseology employed in Section 11 does not bear mention of whatsoever nature to the expression " relationship between the petitioner and the distribution licensee" so as to lend credence to the contentions as strenuously put forth by the petitioner. This single factor alone is enough to reject the contention that there is no statutory relationship between the petitioner and TANGEDCO insofar as the present case is concerned. This Provision contained in section 11 is undoubtedly a special provision but cannot operate independently of 86(1)(f) under which PPA is signed by the parties. Having gone through the averments of the petitioner in Para 10 to 13 of the written submission, we find that the stress is more on the supposed creation of independent statutory relationship between the petitioner and the second respondent. We find that the said contention is only to give a fresh lease of life to the relationship between the TANGEDCO and petitioner which was lost in regard to privity of contract in the earlier cases. This is nothing but an erroneous

and misinterpretation of Section 11 of the Electricity Act, 2003 to which we cannot agree.

Accordingly the second issue is decided against the petitioner.

7. Findings of the Commission on third issue :-

7.1. In order to decide the above issue, we may profitably refer to our own decision in D.R.P.No.20 of 2011 in M/s.MMS steel Private Limited, the relevant portions of which are reproduced below.

> *8.1. We have heard both sides. The short point which arises for consideration is whether the petitioner is entitled to payment for the energy injected into the grid of the respondent Corporation from 24.5.2010 to 21.6.2010 in the absence of a valid agreement between the petitioner and the First Respondent for supply of energy. On going through the facts of the case, it is clear that there was no prior agreement in writing between the parties for injection of energy during the said period. The petitioner has sought to place reliance on the G.O.Ms.No.10 dated 27.2.2009 for injection of energy into the grid of the respondent Corporation on the ground that in view of the said G.O. it was left with no option but to inject the energy into the grid. The petitioner has also taken a stand that the effect of the said G.O. which directed the injection of all exportable energy generated by a generating station into the grid of the respondent Corporation tantamount to denial of open access. On the other hand, the First Respondent contends that there was no proper scheduling or approval for the energy injected by the petitioner during the disputed period and the energy injected was unsolicited and unauthorized. It is further contended by the First Respondent that there is no contractual obligation (which means privity of contract in legal parlance) between the petitioner and the First Respondent for raising a dispute before the Commission and after committing illegality by injection of energy in an unauthorized manner, the petitioner is seeking to get ex-post facto approval to legitimize the illegal act of unauthorized injection of energy. The First respondent has further contended that the*

interpretation of G.O.Ms.No.10 dated 27.2.2009 by the petitioner is faulty and the direction given in the said G.O. is also subject to compliance of transmission constraints, compliance of Grid code and prior approval from the respondent.

8.2. On the careful consideration of the rival submissions, we find that the present case in the normal circumstances relating to absence of agreement for injection of energy would have been squarely covered by the judgment of the Hon'ble Tribunal in Appeal No.123 of 2010 in the matter of M/s.Indo Rama Synthetics (I) Limited Vs MERC which rejected compensation for any power injected into the grid of the licensee without any scheduling or agreement. In such case, we would have no difficulty in straight away rejecting the claim for injection of energy without prior approval. However, the present case is slightly different from the one relating to Indo Rama Synthetics (I) Limited in that the petitioner herein has sought to rely on the conditions imposed in G.O.Ms.No.10 dated 27.2.2009 for justifying the injection of energy. It is therefore necessary to refer to the G.O. relied upon by the petitioner. The relevant portion of the said G.O. is re-produced for easy reference.

*"**In exercise of the powers conferred by sub-section (1) of section 11 of the Electricity Act, 2003 (Central Act 36 of 2003), the Governor of Tamil Nadu hereby issues the following directions in the circumstances arising in the public interest namely;***
(i) All power generation units operating in Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load Factor (PLF); and

(ii) All generating stations shall supply all exportable electricity generated to the State Grid for supply to either Tamil Nadu Electricity Board, or to any other HT consumers within the State as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission.

8.3. It may be seen from the above that there are two directions by the Government of Tamil Nadu to all generating stations in the State of Tamil Nadu, namely,
i) To operate and maintain the generating stations to maximum capacity and plant load factor.

ii) To supply all exportable electricity generated to the State Grid or to any other HT consumer within the State of Tamil Nadu as per the Regulations notified by the TNERC.

8.4. It is clear from the above that the intention of the G.O. is to make use of the energy generated within the State of Tamil Nadu to the maximum extent for the requirement of the State and only for such purpose, the above directions have been given. We are not in complete agreement with the contention of the petitioner that the petitioner was left with no option but to inject the energy into the grid of the respondent in view of the said G.O. for the reason that the said G.O. prohibited only the export of energy outside the State of Tamil Nadu and there was no prohibition with regard to Intra-State Open Access which the petitioner could have very well attempted before injecting the energy into the grid of the respondent. Here again, it is to be noted that the said G.O., even while directing that all the exportable energy generated within the State shall be supplied to the State Grid or to any other HT consumers, at the same time, made it obligatory to comply with the regulations notified by TNERC. Thus, it was not a free-for all situation wherein anybody can inject energy at will. The intention on insistence of agreement was in the interest of securing the safety of the Grid. Therefore, in the absence of any agreement for the injected energy generated during the period in question, the petitioner could not have injected the energy on its own unmindful of the extant regulation meant for security of the Grid. The Regulation 8 of the Tamil Nadu Electricity Grid Code which deals with Scheduling and Despatch of Energy prescribes the procedures to be followed in injection of energy into the grid. The section 32 of the Electricity Act, 2003 which sets out the functions of State Load Despatch Centre also requires the scheduling and dispatch of electricity within the State in accordance with contracts entered into between generating companies and licensees which means that there shall be no injection of energy without the prior approval of the SLDC. On further reading of the said section, it is clear that the SLDC is responsible for carrying out the real time operation of the grid through secure and economical manner and for exercising supervision and control over the energy transmitted through the system. It is essential that an approved schedule by the SLDC is obtained for any injection of energy into the State Grid.

Therefore, the present claim in regard to supply of energy without a formal contract or agreement between the distribution licensee and the petitioner or atleast a prior approval, is not sustainable. The fact that the concerned Superintending Engineer has issued a certificate in confirmation of the receipt of energy injected by the petitioner into the grid of the respondent does not support the case of the petitioner for the reason that a mere acknowledgement of the injection of energy into the grid cannot be construed to be an act legalizing the illegal act of injection of energy into the grid which was deprecated in the Indo Rama's case by the Hon'ble APTEL.

8.5. As stated supra, there is no order in the G.O. under reference to the effect that a prior agreement with a licensee is not necessary for injection of exportable energy into the grid of the respondent. That even in the face of extreme power shortage prevailing at that point of time, the Government was cautious enough to insist on compliance of rules and regulations cannot be lost sight of. All that was sought to be emphasized in the said G.O. was that the energy generated in the State of Tamil Nadu should be utilized within the State and there was no indication of whatsoever nature to form a conclusion that the G.O. directed the generators to supply the energy only to the grid of the respondent Corporation. There was an option also to sell power to any other HT consumer within the State of Tamil Nadu. The petitioner herein has failed to provide any document to the effect that all his effort to sell the excess power to the consumers other than the licensee within the State through Intra-State Open Access failed and that it was forced to inject the energy into the grid of the respondent Corporation. Even in such a case when the Petitioner finds it impossible to sell his energy to anyone, it should have approached the Commission or any other appropriate authority for permission to export power into the State Grid and for fixing of such cost of power in view of the G.O. cited. In the absence of a proper agreement which is required as per the extant regulation to inject energy into the grid of the respondent, the petitioner's unilateral decision to inject energy into the grid is tainted with illegality. Further, in the absence of any material on record to the effect that the attempts to export power on Intra-State Open Access to the consumers within the State of Tamil Nadu failed, the prayer of the petitioner for settlement of claim for the energy injected into the grid during the period in question is

unsustainable. The contention that the other generators have been compensated on similar grounds would not confer any legality on the actions of the petitioner. It is seen that the petitioner has made only a blank statement to the effect that other similar generators have been compensated without any material proof, which cannot be taken on record. Even otherwise, such illegalities by the other generators cannot be treated as a precedent for settlement of claims arising out of illegal acts. Needless to say that the security of the grid is of paramount importance and any injection without scheduling would endanger the real time operation of the grid. In fact, such actions of the petitioner is required to be dealt with under the penal provisions of the Electricity Act, 2003. But, however, in view of the considerable lapse of time, we are not inclined to proceed further. In the result, the petition is dismissed as being devoid of merits. No costs.

In view of the above findings, we are unable to grant relief sought for by the petitioner for the reason that the G.O.Ms. No.10 dated 27.02.2009 even while mandating the injection of all exportable power in to the Grid of the respondent corporation, also gave an option to export power anywhere in Tamil Nadu and not merely to the licensee.

Accordingly the third issue is also decided against the petitioner.

8. Findings of the Commission on fourth issue :-

8.1. It is the contention of the petitioner that the provision adumbrated in Section 11 of the Electricity Act, 2003 for offsetting the adverse financial impact would prevail over any other provisions in the Grid Code especially in regard to the power of SLDC to issue back down instructions thereby the petitioner is entitled to seek compensation under Section 11.

8.2. In this connection it is apposite to state that the Commission being the creature of Electricity Act, 2003 cannot go into the issue as to whether Section 11 of the Electricity Act, 2003 would prevail over the provision in the Grid Code. The Hon'ble Supreme Court of India has held clearly in the case of West Bengal Electricity Regulatory Commission Vs. CESC Limited AIR 2002 SC 3588 that a tribunal which is a creature of a statute cannot test the vires of a Regulation. Applying the said ratio to the case on hand, we can say with certainty that we cannot go into the validity of Regulation 8 of the Tamil Nadu Grid Code vis-a-vis Section 11 of the Electricity Act 2003. However for the purpose of deciding the present issue we, are inclined to examine the scope and extent of Section 11 of Electricity Act 2003 and Regulation 8 of Grid Code to a limited extent without embarking upon the larger exercise of testing the validity of Regulation 8 to see whether there is any absolute conflict which makes Regulation 8 or any other provision of the Grid Code totally inoperative . We find that there is nothing wrong in undertaking the said exercise in a limited sense as the contentions raised by the petitioner in terms of such conflict between Section 11 and Regulation 8 has a direct bearing on the present adjudication. This Commission had the occasion to consider the challenge to the powers of SLDC to issue

directions, albeit, in a different context in D.R.P.No.5 of 2011. The relevant portion of the said order are reproduced below.

> *14.5. FINDINGS OF THE COMMISSION ON THE FOURTH ISSUE*
> *In order to settle the above issue, it is necessary to first examine the powers of the respondent Board to issue off-take instructions. The powers of the SLDC and RLDC have been well defined under the Electricity Act, 2003. The powers of the SLDC in so far as the State of Tamil Nadu concerned in the matter of issue of directions for the safety of the grid cannot be called in question. It is the SLDC which is responsible for safety of the grid and it is the apex body to ensure integrated operation in the power system in a State. It has also been mandated under section 32 of the Electricity Act, 2003 to monitor the operations. Under Section 33 of the Electricity Act,2003 , the State Load Despatch Centre in the state may give such directions and exercise such supervision and control that may be required for the integrated grid operations and for achieving the maximum economy and efficient in the operation of power system in that State. Every licensee, generating company, generating station, sub-station and any other person connected with the operation of the power system shall comply with the direction issued by the State Load Despatch Centre. Such being the case, the contention of petitioner questioning the validity of the off-take instructions cannot be accepted. Any loss or compensation arising therefrom cannot be entertained in the absence of challenge to the said provisions which empower the SLDC to issue such instruction. We, as a creature of Electricity Act, 2003 have no powers to go into the validity of section 32 or 33 and can limit our jurisdiction only to see whether such instructions are in line with the provisions of the Act. If at all, the petitioner suffers from the issuance of such instructions, the remedy lies in very challenge to such provisions and not the consequential loss arising therefrom. In the result, the issue is answered in favour of the respondent.*

8.3. As may be seen from the above, the power of SLDC to issue despatch instructions or oftake instructions is independent of regulatory exercise as it is

carried out on real time basis. The Section 11 which is meant for offsetting financial impact, in our view, does not have any nexus to such powers of SLDC issued during the real time operation of the grid. At the most, a case for compensation for adverse impact under Section 11 can be made out *expost facto* to the issuance of despatch instructions. The issuance of directions under Section 32 cannot be called in question by virtue of the compensatory provision enshrined in Section 11 of Electricity Act 2003.

8.4. Also, we have observed in the findings to the issue No.3 that prior approval of SLDC is required for injection of energy and that without a formal contract or agreement between a Distribution Licensee and the petitioner, no injection of energy is legally sustainable. We have further observed that atleast a prior approval falling short of an agreement is necessary and a mere acknowledgement of the injection of the energy into the Grid cannot be construed to be an act of legalising the illegal injection of energy as it was deprecated in Indo Rama's case by the Hon'ble APTEL. The relevant portion of the order of this Commission in M/s.MMS Steel case as extracted in findings to the issue No.3 as above, would make it clear that Regulation 8 of Tamil Nadu Electricity Grid Code is a complete code in itself as it deals with the scheduling and despatch of energy prescribing the procedure to be followed in injection of

energy into the Grid thereby meaning that the provisions in the Grid Code shall be strictly followed in cases where the energy is pumped into the Grid. However, the petitioner has come up with an argument that the provisions in Section 11 would override the provisions in the Grid Code. We are unable to agree to such contention. The reason is quite simple. It must be understood that Section 11 under which the adverse financial impact suffered by a generating company is mandated to be offset and Section 86(1)(h) under which State Grid Code is specified by a State Commission, operate in different fields. If the argument of the petitioner in this regard is to be accepted, there must be a semblance of commonality of intent or objective between these two provisions. In our view, there is absolutely no element of commonality between these two. At the first blush, the arguments of the petitioner may appear to be too tempting to make Section 11 prevail over Regulation 8 of the Grid Code. But a careful analysis would prove otherwise for the reason that the mandatory requirement of prior agreement or prior approval for injection of energy as postulated in the Grid Code cannot be interlinked to the offsetting of adverse impact as postulated in Section 11 as they are too remote to even have a meeting point of commonality. The Regulation 8 of the Grid Code cannot be read in isolation with Section 11 of Electricity Act 2003, so as to make Section 11 preponderant, solely by virtue of

the inferior status of the Regulation 8 as a subordinate legislation. The Regulation 8 has to be read not only with Section 11 but also to be read with G.O.Ms. No.10 dated 27.02.2009, which is the focal point for the present claim and which is an offshoot of Section 11 directions. The relevant provision of the G.O.Ms.No.10 dated 27.02.2009 is reproduced for easy reference.

> ***"In exercise of the powers conferred by sub-section (1) of section 11 of the Electricity Act, 2003 (Central Act 36 of 2003), the Governor of Tamil Nadu hereby issues the following directions in the circumstances arising in the public interest namely;***
> ***(i) All power generation units operating in Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load Factor (PLF); and***
>
> ***(ii) All generating stations shall supply all exportable electricity generated to the State Grid for supply to either Tamil Nadu Electricity Board, or to any other HT consumers within the State as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission.***

8.5. It may be seen from the above that the G.O.Ms. No.10 which sourced its power from Section 11 that, even while directing the generating stations in Tamil Nadu to operate to their maximum capacity and plant load factor and further directing all generating stations to supply all exportable electricity to TNEB, or to any other HT consumer with the State of Tamil Nadu, at the same time the G.O under reference never missed the point to make it clear that such supply shall be as per the Regulations issued by this Commission.

8.6. Hence, we cannot altogether discard the powers of the SLDC to issue back down instruction which emanate from Section 32 of the Electricity Act or the requirement of prior agreement or prior approval as prescribed in the Regulation 8 of Grid Code so as to place the Section 11 on a higher pedestal and relegate Regulation 8 or any other provision of the Grid Code to the backseat and hold in favour of the petitioner. Such interpretation would militate against the well settled principles of harmonious interpretation of statute. In the light of the same we find the contention of the petitioner that the offsetting adverse impact as provided for Section 11 would have overriding effect on Regulation 8 of the Grid Code is not acceptable as such interpretation would render the entire Grid Code nugatory and set at naught the power vested with SLDC to carryout real time operation of the Grid or for that matter any other provision in the Grid Code. Needless to say that any interpretation which results in absurdity or results in defeating the provisions of other sections of an enactment or a Regulation altogether cannot be agreed to. In such context, the present canvass made by the petitioner for total obliteration of Regulation 8 of Grid Code or any other provision in the Grid Code and make it disappear in oblivion from the shades of Section 86 (1)(h) so as to make it subservient to Section 11 cannot be agreed to.

Accordingly, this point is answered against the petitioner.

9. Findings of the Commission on fifth issue :-

9.1. The principles concerning the quasi contract as postulated in Sections 70 to 72 of the Contract Act 1872 which is sought to be raised by the petitioner herein was also the subject matter of proceedings in D.R.P.No.5 of 2011

9.2. Here it is to be noted that the question raised by the petitioner is not only a straight forward claim under Sections 70 & 72 of Indian Contract which is contractual in nature, but also a statutory claim falling under the provisions of G.O.Ms. No.10. In other words, the petitioner has thought it fit to keep Section 70 and 72 of the contract as reserve provisions to bail it out in case the claim under Section 11 fails. We have severe reservations on this issue for the reason that there is a glaring inconsistency in the two different stands taken by the petitioner. On the one hand, the petitioner seeks to contend that the relationship between a petitioner and the respondent is not at all contractual in nature and rests its hope mainly on Section 11 of the Electricity Act, 2003, but on the other hand, petitioner takes a diametrically opposite stand implying that if the claim under Section 11 fails, the provision contained in Section 70 &72 of the Contract Act should step in. It is paradoxical that the petitioner is ready to embrace the

contractual provisions under Section 70 &72 of Contract Act and treat the relationship between him and the TANGEDCO as a contractual one thereby abandoning the stand taken all along that the relationship between the petitioner and respondent is a statutory creation under Section 11. Though it may be argued that there is a distinction between a formal contract and a quasi contract, a fact remains that the quasi contract also has the attributes of contract. Hence, the stand of the petitioner to invoke the contractual nature of the relationship in the event of failure of statutory claim under Section 11 as advocated by him is beyond comprehension and legal scrutiny.

9.3. Be that as it may, the question whether the principle of quasi contract can be invoked to confer legitimacy to injection of energy without agreement or prior approval came up for discussion in our earlier order in D.R.P.No.5 of 2011, the relevant portions of which are reproduced below.

> *14.6. FINDINGS OF THE COMMISSION ON THE FIFTH ISSUE*
> *14.6.1.on the question of granting relief to the petitioner, it is to be seen whether the principle in regard to quasi-contract can be invoked. In this connection, we are to observe that the Hon'ble Appellate Tribunal refused to invoke section 70 of the Contract which deals with the quasi-contract and held that the energy injected illegally need not be paid for in Indo Rama Synthetic's case. In the present case the petitioner should not have acted in an illegal manner by violating the provisions of the Electricity Act, 2003 and the regulations made thereunder. It has been clearly specified in the Grid Code that scheduling is mandatory before injection of energy into the grid of the respondent. When that is so, it is not correct on the part of the petitioner to contend that it was constrained*

to export electricity into the grid of the respondent Board. Such acts cannot be countenanced bearing in mind the safety of the Grid. No act which is not in line with the provision of Electrlcity Act, 2003 and the regulations made thereunder can be justified on the grounds of protection of commercial interests of the petitioner or on the principle of quasi-contract.

14.6.2. The reasons advanced by the petitioner for injecting energy into the Grid of the respondent Corporation are far from satisfactory. The denial of open access or the issue of off take instructions cannot certainly be grounds for the petitioner to do illegal acts of injection of energy into the grid without proper scheduling arrangements. When there are adequate remedies in the Electricity Act, 2003 to file complaints regarding violations of Electricity Act or the regulations made thereunder before the Commission, we see no reason as to why the said provision were not invoked by the petitioner who for reasons best known to it chose to adopt a method which is at variance with the established canons of law. The injection of energy into the grid without schedule arrangements and without the consent of the respondent herein or the approval of the Commission goes against the provisions of Electricity Act, 2003 and the regulations made thereunder.

14.6.3. What happened to the NEW grid to serve as an eye-opener for all the power managers. The complete blackout made things worse to the people. Needless to say that Grid discipline is indispensable for the stability of the Grid and if the same is thrown to winds and indisciplined acts are allowed to continue, it could cause irreparable damage to the grid of the respondent on whom the responsibility of the safety of the grid rests. As stated above, the Commission cannot be oblivious or a silent spectator to the continuous acts of indiscipline and allow the same to perpetuate. Further, it is to be noted that a claim to be enforceable in court of law, must be legal. An illegal claim cannot be enforced. The violations committed by the petitioner in injecting energy into the Grid cannot be cured by the mere fact that the energy injected was accepted by the respondent. All the same, it must be noted that the respondent had no other go but to accept the energy and could not have prevented the petitioner from injecting energy into the grid in an unauthorized manner.

14.6.4. Though the petitioner stands to lose money in the present case, we cannot come to its rescue. The petitioner has to necessarily pay for his indiscreet act of injecting energy unauthorisedly into the Grid of the respondent. In the result, the petition is dismissed. There will be no order as to cost.

9.4. In view of the aforesaid finding in our earlier order, we cannot agree to the contention of the petitioner for invocation of Section 70 & 72 of the Indian Contract Act. The contentions in this regard are outrightly rejected.

Accordingly the issue is decided against the petitioner.

10. Findings of the Commission on sixth issue :-

10.1. It is the case of the petitioner that the internal committee formed by the respondent has made a concrete recommendation to the respondent herein to offset the adverse financial impact suffered by the petitioner including the tariff for the energy injected. The petitioner has placed heavy reliance on the observation made by the Committee to the effect that the generators are not remediless as they can approach the Commission or any Court and hence a reasonable tariff may be paid to avoid litigation. The petitioner has sought to build up his case forcefully on the said report of the internal committee. The petitioner has obtained the report of said committee under the Right to

Information Act. The operative portions of the said report as extracted by the petitioner, are reproduced below.

> *" 4. Insofar as injection of power in the TANGEDCO's grid is concerned, the generator has to inject the same only after following the mandatory procedures including prior approvals, power purchase agreement and schedulings. In the absence of same, such injection can only be considered as illegal injection and cannot be accounted for.*
>
> *5. In such circumstances, the Committee considered the provisions contained in section 11 (2) of the Electricity Act, 2003, which is extracted hereunder for ready reference.*
>
> *"2. The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate. ".*
>
> *6. No doubt that the said GoTN order mandates that all Power Generating Plants in Tamil Nadu shall operate and maintain generating station to the maximum capacity and PLF and all generating stations shall supply ail exportable electricity generated to the State grid for supply to either Tamil Nadu Electricity Board or to any other HT consumers in the State as per the regulations notified in this regard by TNERC.*
>
> *7. If the generator concerned wishes to comply with the said directions of GoTN, the generators concerned has to enter into an agreement with the TANGEDCO to supply all exportable power to the TANGEDCO by following the rules/ regulations notified by the TNERC or supply energy to any other HT consumers in the State. As the injection of energy to any TANGEDCO's grid was without any authority or authorisation or by following the regulation of the TNERC, TANGEDCO is not legally bound to account such energy and make payment therefor.*
>
> *8. In this connection, the orders of the TNERC and APTEL in certain cases that no compensation is payable for the energy injected into grid in the absence of any agreement for sale of power and without scheduling*

of energy injected into grid based on such agreement have also been deliberated together with the scope of G. O. No. 10.

9. However, the fact remains that the said generators have already injected power into grid, which was in turn sold by TANGEDCO to its consumers but the generators seek payment for such injected energy.

10. It is stated in the first instance that GoTN have the power to impose directions to the generating companies under section 11 (1) of the Electricity Act, 2003 and the TNERC under section 11 (2) thereof, has the powers to offset the adverse financial impact of such directions of the GoTN. The TNERC is the authority to determine or adoption of tariff, inter- alia, for supply of electricity by a generating company to the distribution licensee, directly or through bidding process, under section 62 or 63, as the case may be. But the TANGEDCO is handicapped in dealing with the said request of the generator directly, since the TANGEDCO is not empowered to fix the tariff for such energy without the approval of the TNERC since such energy is unscheduled.

11. Therefore, the generators cannot be said to be remediless and they can approach the TNERC to offset the adverse financial impact including the tariff for the energy injected So far, no generator has approached the TNERC but claiming payment from the TANGEDCO.

12. If the TANGEDCO would like to reject the request for payment for the energy injected without following the mandatory procedure prescribed by regulations, it can be tried but the feasibility of success if challenged before the Commission/ Court may not be 100% in favour of the TANGEDCO in view of the directions imposed by the Government, silence maintained by the TANGEDCO TANTRANSCO for a long time perhaps in view of the shortage of power prevailing in Tamil Nadu, etc.

13. On the other hand, in the facts and circumstances of the case on hand, the TANGEDCO may consider to make payment to the generators on the principle of equity, with reference to TNERC approved rate (as per Order No dated 15.05.2006 and its subsequent amendments) with corresponding average frequency prevailing during the said period. The monthly average frequency of southern grid for the period from January

2009 to March 2012 captured from official website of power grid and corresponding TNERC approved rate are furnished in the annexure enclosed. Much care has been taken for collecting the data, however, the same may be once again verified.

14. If the generators agree to the aforesaid rate, the TNERC may be moved jointly and such rate would mostly likely to be adopted by the TNERC as was done in certain previous cases.

15. However, if the generators do not agree with the above rate, the TANGEDCO may inform the Generators to consider its own course as available in law and in the event of filing petition before the TNERC by the Generators the TANGEDCO may contest the case on merits and finally state that TANGEDCO will abide by the orders that may be passed by the TNERC in this regard."

10.2. The petitioner contends that the respondent cannot be permitted to go against its own committee's report and has invoked doctrine of promissory estoppel to sustain its claim. In this connection, it is to be observed that the report of the Committee has been obtained by the petitioner by invoking the provisions of the Right to Information Act. It is not a case where a direct communication has been addressed to the petitioner by the respondent by holding out a promise. Therefore no promise can be said to have been held out by the respondent to the petitioner. It is to be noted that the essential requirements for invoking the Doctrine of Promissory Estoppel are a) the promisor should have held out a promise b) the promisee, acting upon such promise, should have altered his position. None of this seems to have happened

in this case, and as such the essential requirements of Doctrine of Promissory Estoppel are totally absent in this case. There is no explicit promise on the part of the TANGEDCO by way of communication and the petitioner cannot be said to have altered his position on the basis of such promise. Another important aspect to be noted is, in order to invoke the doctrine of promissory estoppel or legitimate expectation, the cause of action i.e., injection of energy should be posterior to the report of the internal committee. But in the present case, the injection of energy is anterior to the submission of internal report. Thus the promissory estoppel or legitimate expectation can, no way be pressed into service in this case. Hence, the report of the officers of TANGEDCO to the Chairman of TANGEDCO which does not satisfy the basic ingredients of promissory estoppel or legitimate expectation, cannot be relied upon. The petitioner would have had a fair case if such report recommending the tariff to him by the Committee was submitted prior to the injection of energy into the Grid so as to make out a far remote case, if at all any, for promissory estoppel. In such case, the petitioner will have atleast a fair case to say that only on the strength of the report he altered his position. Here again, it is further subject to a requirement i.e., that such report must have been served on the petitioner by the respondent corporation during the official course of dealing. That not being

the case, we see no plausible reason to even remotely entertain the claim by applying the principle of promissory estoppel. To put it otherwise, there is nothing on record to suggest that the said report was acted upon or given effect to by the respondent corporation and that it constituted a promise to the petitioner. In such context, it is to be presumed that such report was called for only to examine the facts and circumstances concerning the injection of energy and to suggest solution to the claim made by the generators. Above all, it is trite that a report has got only persuasive value and it is not binding on the authority which sought for the report. The petitioner has not filed the entire report and has extracted only selected portions, and it is not clear what the terms of reference to the committee were and whether the recommendation of the committee exceeded the terms of reference. Even otherwise, in the absence of any direct communication from the TANGEDCO to the petitioner, the report does not have any relevance, much less binding. Therefore we conclude that the internal committee report of TANGEDCO cannot be relied upon by the petitioner to sustain the present claim.

Accordingly the issue is decided against the petitioner.

11. Findings of the Commission on the seventh & eighth issues :-

11.1. As regards these issues we find force in the contention of the respondent that PTC ought not to have injected energy in excess of the schedule in terms of the PPA and such injection made over and above the schedule need not to be paid for. This was exactly this Commission's decision in D.R.P.No.15 & 16 of 2021 in which this Commission held PTC liable for authorising the generator to inject power in the grid of the respondent without a formal agreement or approval. In the said case, a clear distinction was drawn between the decision rendered in D.R.P.No.8 of 2016 in M/s.MALCO Energy Limited Vs. TANGEDCO where both TANGEDCO and PTC were held responsible jointly and severely in view of the go-ahead given by both PTC and TANGEDCO for injection of energy and the decision in D.R.P.No.15 & 16 of 2011 in M/s.Terra Energy and another Vs. TANGEDCO where PTC alone was held responsible for the reason that TANGEDCO said a firm "No" to the revised schedule.

11.2. The relevant portion of the order is reproduced below.

> *10.36. In this connection, the Commission may also refer to its order dated 02-03-2021 in D.R.P. No. 8 of 2016 in M/s. Malco Energy Ltd. Vs. TANGEDCO wherein both TANGEDCO and the PTC were held responsible to pay the dues jointly and severally in case where there are two independent contracts, namely PPA & PSA. The same has also been sought to be reviewed in a Review Petition and the same is pending. Without any prejudice to the decision to be taken in the said Review Petition, we have to state that the said decision to hold PTC and*

TANGEDCO jointly and severally liable was taken in the light of the consent given by TANGEDCO to the revised schedules. The following portions of the order would be relevant:-

6.9. It has been the consistent stand of the Commission that the power injected unathorisedly need not be paid for. The Hon'ble Appellate Tribunal has also observed the same categorically in IndoRama Synthetics (I) Ltd. case (Appeal No. 123 of 2010 dated 16-05-2011). In the present proceedings, the first respondent has sought to deny payment to the petitioner for the power injected during the interim period on the ground that the said power was illegally injected and hence need not be paid for in view of the ratio held in Indo-Rama case. We are unable to agree fully on this score. We find that the said case is applicable only when the stand of the parties are consistent throughout to the effect that formal agreement is necessary for injection of power and only when there is no inequity arising out of such stand taken by one party to the case. We cannot import the said ratio mechanically without having regard to the conduct of the other side. We find that the injection of power during the period from 01-06-2010 to 03-06-2010 cannot be termed as unauthorised injection in a strict sense. We also find that prior approval was sought by the petitioner before injecting the power into the grid during the interim period and the petitioner approached the first respondent for permission on 01-06-2020 to inject the power to be generated in the interim period. However, for reasons best known to it, the second respondent in its letter dated 03-06-2010 sought the consent of the first respondent for injection of power only for the period starting from 04-06-2010 leaving out the first three days and the first respondent immediately agreed to schedule the power with effect from the early hours of 04-06-2010 vide letter of even dated."

10.37. As can be seen from the above, the present case stands as a slightly footing with TANGEDCO saying "NO" to the revised schedule unlike the said case where TANGEDCO agreed to the said schedule. Hence, in this case we have to hold that PTC is solely liable for the energy supplied outside the purview of PSA entered between PTC and TANGEDCO but well within the purview of PPA entered into between the petitioner and PTC.

10.38 We find force in the contention of TANGEDCO that the petitioner did not take its prior approval before injecting power into the Grid and the said power was unrequisitioned. We are also of the view PTC is not entitled to relief and has to honour its commitments both under PPA and PSA. As regards TANGEDCO, as stated supra, there is no material breach of contract on its part in regard to PSA and therefore, we see no illegality in its refusal to pay up for the quantity of energy fed into its Grid without any prior approval or authorisation. Though we cannot be of any help to PTC in the instant case, we hasten to add that in independent contracts such as the present PPAs and PSAs, there must be explicit clauses making the parties aware that PPAs are integral part of PSA so as to avoid ambiguity. It is for the parties to ensure adequate safeguard in such cases to make the PPA and PSA back to back contracts by incorporating relevant clauses.

11.3. In the present case, the petitioner has submitted that backing down instructions were issued only to PTC and not to it. The relevant portions of written Submissions are reproduced.

What is significant to note in the present case is that the backing down instructions were not issued to the Petitioner by the 2nd Respondent, but were in fact only issued to PTC. The only backing down instructions that were issued to the Petitioner either by the Respondents or PTC at the contemporaneous point in time are the following: 27.08.2010, 21.09.2010 & 28.12.2010. Therefore, even assuming without admitting that the Respondents issued backing down instructions, the same were not issued to the Petitioner and therefore in the absence of knowledge of such instructions, the Petitioner could not have reduced the capacity of its generating station contrary to the mandate of the GO. At best, even assuming the Respondents' case in this regard to be entirely correct, the Petitioner could only be deemed to be disentitled to the reliefs sought herein to the extent of the excess injection despite the backing down instructions available on record today. It is also apposite to state that the backing down instructions were contrary to the mandate of the GO which was issued only in view of the extraordinary circumstance prevailing in the State at the relevant point in time.

11.4. We have to dismiss the above contention on the face of it for the reason that if such contentions are true, the petitioner should have added PTC as a party respondent in this case. Having not done that, it does not lie in the mouth of the petitioner to contend that it was not aware of the backing down instructions. Here again, the stand of the petitioner is inconsistent. On the one hand, the petitioner takes a firm stand that there is no privity of contract between the petitioner and second respondent and the case is governed by Section 11 of the Electricity Act and that the PTC is neither a necessary nor a proper party to the dispute, but on the other hand the petitioner takes a stand that instructions were issued only to PTC and not to it. From this solitary fact it is crystal clear that the presence of PTC in the present proceeding is very much necessary for complete and effective adjudication of the matter in dispute and as such PTC is a necessary party and the petitioner for best reasons, has not added PTC as a party. The petition, as contended by the respondents, is bad for non joinder of necessary party.

The PPA between the petitioner and PTC on the one hand and the PSA between the PTC and TANGEDCO on the other hand being independent contracts and not a back to back one as clearly elucidated in our earlier orders referred supra and reiterated herein, we are of the considered view that the

contention of the respondent that PTC ought not have injected energy in exercise of the schedule power in terms of PSA and such injection made over and above the same is not liable to be paid has got force. In all the cases referred herein, the PTC was a respondent though the generator made a claim against TANGEDCO or against both TANGEDCO and PTC jointly and severally, as the case may be. However, in the present case the petitioner has chosen not to add PTC as a party. For all intent and purposes, it is only the PTC which has to make good any loss suffered by the petitioner herein as the privity of contract is existing only between PTC and petitioner and TANGEDCO is a stranger to the said agreement. If at all TANGEDCO, by explicit actions contributed to the loss suffered by the petitioner, it is for PTC , in turn, to sue TANGEDCO and there cannot be a direct claim by the petitioner against TANGEDCO leaving out PTC altogether. We conclude that having undertaken to execute independent contract with TANGEDCO, the PTC could not have permitted injection of energy in excess of schedule power and ought to have restrained the petitioner from injecting the energy, as rightly contended by the respondent.

Accordingly this issue is also decided against the petitioner.

12. Finding of the Commission on the ninth issue:-

In view of the findings rendered above in regard to issues No.1 to 8, this Commission decides that the petitioner is not entitled to any relief.

Accordingly, the issue decided.

In the result a petition is dismissed. Parties shall bear their respective costs.

(Sd.....)	(Sd.....)	(Sd.....)
Member (Legal)	Member	Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission