

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**APL No. 864 OF 2023 &
IA No. 2139 OF 2023**

Dated: 7th August, 2024

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

In the matter of:

1. UTTAR PRADESH POWER CORPORATION LIMITED

*Through its Chief Engineer (Power Purchase Agreements),
14th Floor, Shakti Bhawan Extension,
14-Ashok Marg, Lucknow,
Uttar Pradesh - 226001*

... Appellant No.1

2. PASCHIMANCHAL VIDYUT VITRAN NIGAM LIMITED

*Through its Director
Urja Bhawan, Victoria Park,
Meerut, Uttar Pradesh – 250001*

... Appellant No.2

3. PURVANCHAL VIDYUT VITRAN NIGAM LIMITED

*Through its Director
DLW, Vidyut Nagar,
Bhikharipur, Varanasi,
Uttar Pradesh – 221211*

... Appellant No.3

4. MADHYANCHAL VIDYUT VITRAN NIGAM LIMITED

*Through its Director
4-A, Gokhale Marg,
Lucknow, Uttar Pradesh – 226001*

... Appellant No.4

VERSUS

1. AMPLUS GREEN POWER PRIVATE LIMITED

*Through its Associate Vice President,
A-57, DDA Sheds,
Okhla Industrial Area,
Phase-II, New Delhi - 110020*

...Respondent No.1

2. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

Through its Secretary,
Vidyut Niyamak Bhawan,
Vibhuti Khand, Gomti Nagar,
Lucknow - 226010

...Respondent No.2

3. UTTAR PRADESH STATE LOAD DESPATCH CENTRE

Through its Director,
Phase – II, Vibhuti Khand,
Lucknow – 226010

...Respondent No.3

4. Noida Power Company Limited

Through its Executive Officer,
Commercial Complex H-Block,
Alpha Sector II,
Greater Noida - 201308

...Respondent No.4

Counsel on record for the Appellant(s) :

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Shubham Hasija for Res. 1

C.K. Rai
Vinay Kumar Gupta for Res. 2

Divyanshu Bhatt
Shashwat Singh
Savyasachi Saumitra for Res. 3

JUDGMENT

PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY)

1. The instant appeal is preferred challenging the order dated 23.06.2023 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition No. 1832 of 2022, whereby the Commission has permitted banking up to 85% to Amplus Green Power Private Limited (**in short "AGPL"**) qua three of its customers in terms of Regulation 31(a)(ii) of the CRE Regulations, 2019.
2. The Appellant No.1 is Uttar Pradesh Power Corporation Limited (**"UPPCL"**), the deemed transmission Licensee for the State and Appellant Nos. 2 to 4, are Distribution Licensees in the State of Uttar Pradesh, namely, Pashchimanchal Vidyut Vitran Nigam Limited (**PVVNL**), Purvanchal Vidyut Vitran Nigam Limited (**PuVVNL**) and Madhyanchal Vidyut Vitran Nigam Limited (**MVVNL**) [collectively referred to as **UP DISCOMs**].
3. The Respondent No 1, AGPL operates a 50 MW ground mounted Solar Power Project located at Mirzapur, Uttar Pradesh, a captive generation project with supply tied up with 13 consumers. Respondent No. 2 is Uttar Pradesh Electricity Regulatory Commission (in short **"UPERC/State Commission"**) which is the State Electricity Regulatory Commission. Respondent No. 3 is the Uttar Pradesh State Load Despatch Centre (**in short "UP SLDC"**) and

Respondent No. 4, the Noida Power Company Limited (**in short “NPCL”**) is also a Distribution Licensee and operates in Greater Noida, Uttar Pradesh.

Facts of the Case

4. The UPERC, on 25.07.2019, notified “**CRE Regulations 2019**”, effective retrospectively from 01.04.2019 and valid till 31.03.2024. Under the CRE Regulations 2019, electricity banking is permitted under Regulation 31(a), which includes specific conditions; one of them being electricity banking would be permitted up to 100% contingent upon mutual agreement between the Renewable Energy (RE) generator and the concerned Distribution Licensee; however subject to the technical feasibility of electricity evacuation.

5. On 02.12.2019, AGPL’s project was commissioned and Bulk Power Transmission Agreement (“**BPTA**”) and Bulk Power Wheeling Agreements (“**BPWA**”) were entered into between PVVNL, AGPL and UPPTCL on 07.11.2020.

6. On 24.01.2021, AGPL’s project achieved Commercial Operation Date. On 08.03.2021, 12.05.2021 & 12.08.2021, AGPL communicated UPPCL regarding the execution of a banking agreement for its captive consumers, HT-Media and DSL- Kasna Ecotech. On 01.12.2021, UPERC issued an order in Petition No. 1757 of 2021, declaring peak and off-peak hours for banking and withdrawal of banked electricity under Regulation 2(v) of the CRE Regulations 2019. The Peak hours were defined as 18:00 Hrs. to 24:00 Hrs., and off-peak hours as 00:00 Hrs. to 18:00 Hrs.

7. On 05.01.2022, UPPCL informed AGPL of its proposal to bank 25% of the electricity generated by AGPL's project, as per Regulation 31(a)(ii) of the

CRE Regulations 2019 and requested AGPL to execute the banking agreement.

8. Subsequently, on 15.01.2022, AGPL responded, expressing that UPPCL should reasonably exercise its discretion under Regulation 31(a)(ii) regarding the extent of electricity banking. Further, AGPL stated that it had assumed that 100% banking would be permissible and had already entered into commercial agreements based on this understanding with its captive consumers. Consequently, UPPCL on 29.01.2022 responded, emphasizing that under the explicit provisions of the CRE Regulations 2019, electricity banking is capped at 100%, not guaranteeing an unconditional right. UPPCL referred to judicial decisions and regulations of other electricity regulatory commissions nation wide to underscore the practical and technical challenges which Distribution Licensees encounter in offering banking services and UPPCL reaffirmed its offer to bank 25% of AGPL's electricity.

9. AGPL filed Petition No. 1832 of 2022 with UPERC on 03.05.2022. The UPERC issued an interim order on 03.10.2022, directing UPPCL to execute a banking agreement with AGPL for 25% of electricity, qua its three captive Open Access Consumers (OACs), pending the final outcome of Petition No. 1832 of 2022. On 22.10.2022, in compliance with the interim order issued by the UPERC, UPPCL signed banking agreements with AGPL for its three Open Access Consumers, namely, HT Media Limited, Kanpur Plastipack Limited-Unit-1 and Dharampal Satyapal Limited.

10. UPERC issued order dated 13.12.2022 in Petition No. 1832 of 2022, whereby the UP DISCOMs were directed to provide AGPL with 100% banking unless there was some technical non-feasibility with respect to evacuation.

Thereafter, an appeal was filed against the said order dated 13.12.2022 by UPPCL and UP DISCOMs bearing Appeal No. 91 of 2023 before this Tribunal.

11. This Tribunal, vide its order dated 31.01.2023 set aside the UPERC order dated 13.12.2022 and remanded the matter to UPERC, specifically to evaluate UPPCL and UP DISCOMs' justifications for their action in proposing to bank 25% of electricity for three Captive Open Access Consumers (OACs) of AGPL, deviating from the 100% electricity banking provided to other Captive 10 OACs of AGPL who had already executed banking agreements. Furthermore, this Tribunal directed that the provision for 100% banking facility must continue to be available to the three Captive OACs until UPERC issues an order following the remand proceedings.

12. In compliance with the directions of this Tribunal, three supplementary agreements were signed on 23.02.2023 amending the banking agreements dated 22.10.2022, between the three Captive OACs and UPPCL & UP DISCOMs. These supplementary agreements established an interim arrangement allowing for 100% banking of electricity, to be utilized by these three Captive OACs until the conclusion of the remand proceedings in Petition No. 1832 of 2022 pending before the UPERC.

13. On 23.06.2023, UPERC passed the final order in Petition No. 1832 of 2022 directing that 85% Banking for the balance three customers of Respondent No1 is to be provided by the Appellant. Aggrieved by the said order, the Appellant has filed the present appeal.

Appellants' submissions

14. Learned counsel for the Appellants submitted that their proposal for 25% banking is based on the fact that the banking agreements between the

Appellant and AGPL's for 10 out of 13 of its captive consumers were executed between 01.10.2020 and 01.10.2021, while the agreements for the remaining 3 captive consumers, which are the subject matter of the present dispute, were processed only after 16.11.2021. Learned counsel further submitted that the date 16.11.2021 is significant due to the order passed in Petition No. 1761 of 2021 in the case of "**AmpSolar Technology Private Limited & Ors. v. UP SLDC & Ors**" (**'AmpSolar Judgement'**). By such order dated 16.11.2021, UPERC altered the dispensation regarding slots for banking and withdrawal of banked electricity. Pertinently, Regulation 31(a)(iii) of the CRE Regulations 2019 states that withdrawal of banked electricity shall be allowed as per the TOD system, i.e., withdrawal of electricity during peak/off-peak hours only up to the amount banked in that TOD slot. In the order dated 15.07.2019, the UPERC stated that if the "peak/off-peak hours" are not declared by UPERC order or defined by the UP SLDC, it will be as per hours defined in the tariff order issued by the UPERC. Accordingly, prior to the order dated 16.11.2021, the 4 (Four) TOD slots were being applied for banking and withdrawal of Energy.

15. Learned counsel for the Appellants further submitted that the UPERC in its order dated 16.11.2021, defined Peak hours as 18:00 Hrs to 00:00 Hrs i.e., 6 hours of a day and off-peak hours to be 00:00 Hrs to 18:00 Hrs i.e., 18 hours of a day. This change financially impacted the Appellants. Previously, under the 4-TOD slot system, TOD 4 – 23:00 Hrs to 05:00 Hrs had no banking and, accordingly, there was no withdrawal of banked electricity, subjecting AGPL's captive consumers to a retail tariff at around ~₹8/kWh. However, the 16.11.2021 order merged a large chunk of the aforesaid TOD 4 slot with two other slots i.e., TOD 1 – 05:00 Hrs to 11:00 Hrs and TOD 2 – 11:00 Hrs to 17:00 Hrs, creating an 18-hour off-peak slot. Consequently, electricity generated during erstwhile TOD 1 and TOD 2 can now be banked on any subsequent day

(within Q+2 quarters) and withdrawn during the erstwhile TOD 4 slot also because all three TOD slots are clubbed into one 18-hour long off-peak TOD slot. Furthermore, the electricity drawn by AGPL's captive consumers during the 18-hour off-peak TOD slot, including TOD 4 (23:00 Hrs to 05:00 Hrs), is to be treated as withdrawal of banked electricity. For this withdrawal, only 6% of the units are retained by the Appellants as banking charges, in contrast to the earlier imposition of a retail tariff of approximately ₹8/kWh. It is, in view of the order dated 16.11.2021 issued by the UPERC, the proposed quantum for banking by the Appellants was changed from 100% under the previous 4-TOD slot system to 25% under the 2-TOD slot (peak/off-peak hours) system

16. Learned counsel for the Appellants also contended that under the Impugned Order, the UPERC dismissed the Appellants justification for 25% banking in one single paragraph, by incorrectly attributing the settled interpretation of Regulation 31(a)(ii) of the CRE Regulations 2019 to the Appellants and erroneously stating that 100% banking was allowed under the CRE Regulations 2019 considering TOD slots. Firstly, this Tribunal had already held that an agreement between the Appellants and the RE CGP is a prerequisite for banking up to 100%, which has already attained finality and is binding on the UPERC. However, in contrast, the UPERC consciously omits the words "upto" and "as agreed" from the CRE Regulations 2019 and misinterprets the provision, which clearly states: "Banking of energy up to 100%, as agreed between the Renewable Energy Generating Power Plants and the Distribution Licensee, shall be allowed subject to technical feasibility regarding evacuation." Therefore, in exercise of rights available to it under Regulation 31(a)(ii) and as confirmed by the Tribunal, the Appellants proposed 25% banking for all RE CGPs whose applications were processed after 16.11.2021. Secondly, the decision of the UPERC regarding TOD slots under the CRE Regulations 2019 only came on 16.11.2021, whereas the CRE

Regulations 2019 were framed on 25.07.2019. Therefore, it is a factually erroneous statement that TOD slots were pre-determined when the provision for 100% banking was placed in the regulations. Hence, this discrepancy renders the findings in the Impugned Order legally flawed and contradicts the APTEL Judgment dated 31.01.2023.

17. The order dated 16.11.2021 recognized that these changes were necessary for the feasibility and economic viability of RE CGPs; however, it is submitted that this dispensation transferred financial burdens from AGPL to the Appellants, affecting them particularly in periods of nil generation i.e., the erstwhile TOD 4 slots – 23:00 Hrs to 05:00 Hrs. This prevents the Appellants from charging retail tariffs for electricity supplied to AGPL's captive consumers, treating such supply as withdrawal of banked electricity. Despite Prices in the spot market going as high as ₹12/kwh and 6% banking charges paid on nominal basis, do not fully cover the costs incurred by Appellants for backup power, affecting their commercial interests and, consequently, those of consumers in the State. Hence, adjustments were made to the banking proposal to protect these interests effectively.

18. It is also submitted that during the hearing, AGPL erroneously contended that the quantum of banking could not be modified despite changes in circumstances following the order dated 16.11.2021, incorrectly importing extraneous reasoning, which is impermissible in view of the law settled by the Hon'ble Supreme Court in the case of "***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.,***" (1978) 1 SCC 405.

19. The impugned order dated 23.06.2023 holds that the Appellants meet 85% of their base load requirements through long-term PPAs, suggesting a consistent variable cost regardless of TOD slot for supply under these

contracts. While the UPERC approximation of 85% lacks evidentiary support, it acknowledges that at least 15% of power is procured by the Appellants through short-term sources such as power exchanges, which are notably more expensive. This 15% procurement significantly burdens the Appellants financially.

20. Learned counsel for the Appellants further submitted that the order dated 16.11.2021 uses the phrase “exactly not accurate” to claim that the Appellants would not face additional financial burden. This finding neither supports AGPL nor the Appellants. The Appellants submissions were dismissed as “exactly not accurate” without proper analysis, making the statement by the UPERC inherently flawed. This should not hinder the Appellants from exercising their rights under Regulation 31(a)(ii) of the CRE Regulations 2019 based on a final interpretation by this Tribunal.

21. Learned Counsel for the Appellant further asserted that in due compliance with the APTEL Judgment, the Appellants presented justification before the UPERC. It also erroneously stated that such 100% banking was based on TOD slots as decided by the UPERC, whereas the UPERC decision on TOD slots and peak/off-peak hours applicable to banking was rendered only on 16.11.2021. Prior to this, the 4-TOD slot system was in effect in terms of the UPERC order dated 15.07.2019, specifying that peak/off-peak hours would be as per the TOD slots under retail tariff orders unless otherwise specified by UP SLDC or the order of the UPERC.

22. Learned counsel for the Appellants further contended that the Appellants did not concede that the banking requirements for any one of the 3 captive consumers should be fixed at 85%. However, the Impugned Order erroneously allowed banking for AGPL’s Captive OACs at 85%, stating that it relied on the

submissions by UPPCL, which inaccurately reflected the Appellants' position. The findings of the UPERC are beyond the scope of the remand because the scope of remand was limited to examining the reasons for the deviation by the Appellants concerning the quantum of banking between the 10 captive consumers of AGPL and the 3 captive consumers of AGPL. Consequently, any findings beyond this specified scope are without jurisdiction and should not be considered valid. The Impugned Order acknowledges some merits in the submissions of the Appellants deviating from 100% banking but sets the quantum at 85%. Since UPERC found justification for deviating from 100%, it should not have dictated the specific quantum of 85% within the limited scope of remand. In view of the above submissions, the learned counsel for Appellants prayed to Set aside the impugned order of UPERC.

Respondent submissions

23. Learned counsel for the Respondent No.1-AGPL submitted that there are 13 captive users who are being supplied power from its 50 MW plant. The instant appeal arises from the fact that, although 100% banking was permitted for 10 captive users—some of whom applied for banking subsequent to the 3 other captive users, these 3 users were not granted 100% banking until as late as 2022. AGPL approached the UPERC, alleging that UPPCL was abusing its dominant position by limiting banking for captive users to 25%. Learned counsel for Respondent No. 1 claimed that this was done in order to (i) force users to buy power from discoms instead of using captive power (ii) discourage renewable energy for captive use (iii) acquire unbanked power at no cost (since UPPCL pays Rs. 2/unit for lapsed power but nothing for unbanked power) (iv) ensure captive users purchase power from discoms at high tariffs Rs. 6.80/unit to Rs. 7.10/unit. If banking is limited to 25%, power generated by the captive plant is lost to the grid without

compensation, allowing UPPCL to either earn retail tariff on this power or sell it on the exchange.

24. Learned counsel for the Respondent No.1-AGPL further submitted that the subject matter of remand was limited to three consumers, who faced discrimination regarding their banking applications. Some applications for 100% banking were initially not processed alongside those granted, later resulting in reduced banking quantum without clear explanation. The Respondent No.1 placing reliance on the Appellant's letter dated 05.01.2022 (denial of 100% banking), letter dated 29.01.2022, and their letter dated 15.01.2022 (response to denial), submitted that subsequent argument regarding a change in approach due to the Peak & Off-Peak slots, as purportedly introduced in the AmpSolar judgment, is an afterthought and was not the original reason given for the denial of banking. In fact, the AmpSolar judgment was first mentioned by the Appellant in their affidavit dated 08.05.2023 during the remand proceedings.

25. Learned counsel for the Respondents also submitted that the Appellant's submission in its reply dated 10.01.2022 filed during the original proceedings stated that banking is subject to satisfaction of three conditions: (i) withdrawal of banked electricity shall not exceed the amount banked in the respective slot, as clarified in the Commission's Order dated 01.12.2021, with peak hours from 18:00 to 24:00 and off-peak from 00:00 to 18:00; (ii) banking and withdrawal of banked energy require day-ahead scheduling; and (iii) banking charges for solar captive plants shall be 6% of banked energy. However, in the remand proceedings, the Appellant's Additional Affidavit dated 13.04.2023 stated that the Commission had misconstrued the applicable regulations and their implications in the first round. The Appellant also cited scheduling data from UP SLDC for FY 2021-22 and 2022-23 to show that AGPL's average banking percentage is around 34% and the

Affidavit did not mention any financial loss suffered by the Appellant or reference of the AmpSolar Judgement.

26. Learned counsel for the Respondent -AGPL contested that it is wrong on the part of Appellant to claim that issue of TOD slots and peak/off-peak hours was clarified by the Commission only on 16.11.2021. The Appellant has already acknowledged that it was not aggrieved by the peak and off-peak hours declared in the AmpSolar Judgment. Thus, the Appellant's claim of no prior clarity before the AmpSolar Judgment and subsequent acceptance of the TOD slots indicates that reliance on the AmpSolar Judgment was an afterthought. No details of additional cost or financial loss suffered were provided to the Commission during the remand proceedings. It is also asserted that the UPPCL justified the differential treatment of the three captive users in the remand proceedings on two grounds; firstly, UPPCL had to procure costly power to supply the banked energy to captive users during peak demand periods, but did not provide details of cost burden to UPERC at any stage; and secondly, the three captive users did not need banking up to 100%. However, the issue of additional banking costs on account of the AmpSolar Judgment dated 16.11.2021 was never raised by UPPCL in its communications, the initial proceedings before UPERC, or the additional affidavit dated 13.04.2023 during the remand proceedings. Conversely, AGPL, in its rejoinder dated 05.10.2022, highlighted that UPPCL was making a net profit of Rs. 22.31 lacs per MW per annum on banked power if 100% banking was allowed, based on the tariff allowed to UPPCL and the weighted average power price in the exchange during relevant time blocks.

27. Learned counsel for the Respondent submitted that the State commission in its order dated 01.12.2021 in Petition No. 1757 of 2021 ("AGPL Vs UPPCL and Ors") appreciates that the ToD system under the

CRE Regulations, 2019 pertains to banking and withdrawal of banked power by Captive Generating Stations, focusing on feasibility and economic viability while adhering to peak and off-peak hours. It is different from the treatment of TOD which concern demand management on the consumer side. Applying ToD principles of Tariff order to banking for Captive users would undermine the intent of the CRE Regulations, 2019. However, there is no occasion for the Appellant to suffer losses due to banking if peak and off-peak ToD slots are maintained. This order was implemented without challenge and therefore, now it cannot become the basis for reduction of banking quantum.

28. Learned Counsel for Respondent No.1 further asserted that the UPERC rejected the Appellant's claim of bearing additional burden from procuring power at higher costs as inaccurate. With the finality of the AmpSolar Judgement dated 16.11.2021, these issues are resolved and cannot be raised again by the Appellant to justify restricted banking. The AmpSolar Order's "Issue No. 2" regarding defining peak/off-peak hours was settled by the Commission. The Appellant did not argue that its challenges arose because banking operates in two slots peak and off-peak hours rather than four slots of Retail Tariff TOD in any submission to the Commission.

29. Additionally, regarding the contention that captive users did not require banking up to 100%, it is admitted that the average banking requirement exceeded 25%. UPPCL's affidavits indicated an average banking of 42.20% for AGPL's captive plant in FY 2021-22 and 35.50% from April to August FY 2022-2023. The maximum energy banked in a time block was reported as 80.06% and pointed out discrepancies in UPPCL's banking figures, noting that the average for April 2021 to August 2022 should not be lower than the combined average of the two periods. It is also submitted that the banking up to 85% based on presented data was allowed by the Commission in the impugned order. Further, UPPCL's affidavit dated 08.05.2023 stated that the

three captive users required banking only up to 86%, with HT Media Limited utilizing the maximum 86%, not Dharampal Satyapal Limited or Kanpur Plastipack Limited. It was the contention of the Appellant before this Tribunal that the Commission erred in granting 85% banking universally, whereas HT Media Limited was the sole user to utilize up to 86% banking.

30. Learned counsel for Respondent No.1 submitted the relevant extract of the Affidavit dated 08.05.2023 filed by the Appellant, as given hereunder:

“5.1 In its response dated 27.04.2023, AGPL has placed reliance on the following data –

....
....

S. No.	Consumer Name	Jan to Mar 2022 (Q1- 2022)		
		Injection (kWh)	Lost (kWh)	Lost (%)
1	DS Limited, Greater Noida	6,25,242	347095	56%
2	HT Media	17,41,746	1497936	86%
3	Kanpur Plastipack Unit -1	8,09,465	415115	51%

5.2 Even for the sake of argument but not admitting, if the above data has to be taken on face value, it is evident that AGPL neither has the requirement for 100% banking nor can AGPL utilise 100% banking insofar as the above consumers are concerned.....”

The Appellants failed to present any data demonstrating a financial burden resulting from the AmpSolar Judgement dated 16.11.2021, aside from a general assertion that UPPCL would incur additional costs due to the Commission's prescribed peak/off-peak hours differing from those of UPPCL/UP-DISCOMs.

31. It is further contended that the AmpSolar Judgement did not introduce a new TOD mechanism for banking; the peak/off-peak approach for banking

already existed under the CRE Regulations, 2014. Therefore, the entire case now sought to be made out by the Appellant that the AmpSolar Judgement was a deviation from TOD slot system is baseless. The CRE Regulations of 2014 and 2019, along with the AmpSolar Judgement, specifically recognize only two slots of peak and off-peak. The TOD slots/ System as provided vide the tariff orders is as follows:

Summer Months (April to September)

<i>Hours</i>	<i>% of Energy Charges</i>
<i>05:00 Hrs – 11:00 Hrs</i>	<i>(-) 15%</i>
<i>11:00 Hrs – 17:00 Hrs</i>	<i>0%</i>
<i>17:00 Hrs – 23:00 Hrs</i>	<i>(+) 15%</i>
<i>23:00 Hrs – 05:00 Hrs</i>	<i>0%</i>

Winter Months (Oct to March)

<i>Hours</i>	<i>% of Energy Charges</i>
<i>05:00 Hrs – 11:00 Hrs</i>	<i>0%</i>
<i>11:00 Hrs – 17:00 Hrs</i>	<i>0%</i>
<i>17:00 Hrs – 23:00 Hrs</i>	<i>(+) 15%</i>
<i>23:00 Hrs – 05:00 Hrs</i>	<i>(-) 15%</i>

32. Learned counsel for the Respondent No.1 submitted that if one considers the four-slot Retail Tariff TOD system, it is clear that the tariffs applied to three out of the four slots (from 05:00 hrs to 11:00 hrs, 11:00 hrs to 17:00 hrs, and 23:00 hrs to 05:00 hrs) are either at the Normal Tariff rate (0% discount) or a Discounted Tariff rate (-15% discount), applicable during both summer and winter months. Only one slot, from 17:00 hrs to 23:00 hrs, has a tariff higher than the Normal Tariff (+15% extra). The Retail Tariff TOD system imposes a higher tariff during peak hours, when demand exceeds supply, to encourage shifting of the load to other hours. Consequently, hours when the tariff is either Normal or Discounted are considered "Off-Peak" or "non-Peak" hours. And therefore, based on the same reasoning, the time

period from 00:00 to 03:00 hrs in the months of April to October, and from 06:00 to 07:00 hrs in the months of November to March, which UPPCL claims to be peak hours, should actually be classified as "off-peak hours" under the four-slot Retail Tariff TOD system. Therefore, there is no justification for purchasing costly power during these time slots.

33. "Time of Day" or "TOD" is the division of a day into specific time slots as determined by the Commission. TOD slots can be structured according to regulatory requirements. Regulation 31(a)(iii) specifies two TOD slots, as clarified in paragraph 28 of the AmpSolar Judgement dated 16.11.2021. UPPCL did not address "Issue No. 1," which pertains to the Commission's clarification that banking should be operated in two slots, peak and off-peak, rather than the four slots of the Retail Tariff TOD.

34. Learned counsel also contended that the UPERC correctly understood the remand scope of the Impugned Order and reviewed relevant affidavits and submissions. UPERC held that the AmpSolar Judgement dated 16.11.2021 cannot alter banking agreements. UPERC observed that while banking agreements are individually signed by consumers, the facility is provided to renewable energy generators. However, Out of 13 captive users, 10 received 100% banking, and limiting 3 to 25% lacked merit. UPERC found that averaging banking across all users is not a valid benchmark for restrictions. The records showed that banking was utilized up to a maximum of 85%, leading UPERC to decide that banking for the remaining 3 users should be capped at 85%, while the agreements for the 10 other captive users remain unchanged. Learned counsel for the Respondent No.1 also submitted that there is no loss to the Appellants on account of the AmpSolar judgment, and any such claims are misleading. The Appellant does not need to procure additional power from the exchange to supply banked power. This claim is incorrect because AGPL's captive consumers are also UPPCL/UP DISCOMs consumers with individual contract demands. UPPCL is required to have long-term PPAs with generators

to meet these consumers' power needs. Banked power is supplied against such tied-up power and is not in excess of the contract demand. If the consumers did not draw banked power, the Discom would still supply the same power under the contract demand without additional cost.

35. However, the TOD system in Regulation 31(a)(iii) does not mention four time slots, as claimed by the Appellant. The plain language of Regulation 31(a)(iii) specifies only two slots: peak and off-peak. This is consistent with the language of Regulations 6(i)(v) and 31(a)(iii) of the CRE Regulations 2019. Therefore, in light of the above, there is no error in the judgment that warrants interference by this Tribunal.

Discussion and Analysis

36. We have gone through the submissions made by the learned counsel for the Appellants and Respondent. Present matter has been referred to this Tribunal for adjudication, arising from the impugned order passed by UPERC dated 23.06.2023, subsequent to remand vide this Tribunal order dated 31.01.2023. This Tribunal, in the remand order dated 31.01.2023 has referred Regulation 31a (ii) of UPERC CRE Regulations 2019, as given below:

“31. Banking Of Power

a) Renewable Energy Source Based Generation and Co-Generation Plants/Captive RE:

ii. Banking of energy up to 100%, as agreed between the Renewable Energy Generating Power Plants (except for SHP and MSW plants) and the Distribution Licensee, shall be allowed subject to technical feasibility regarding evacuation”

And has held as below:

In terms of sub-clause (ii), banking of energy up to 100% is permissible as agreed between the renewable energy generating plant and the distribution licensee. A plain and literal reading of Regulation 31 (a) (ii) does seem to indicate, as a pre-requisite, an agreement between the Appellant and the first Respondent for banking of energy upto 100%. The Commission has, however, interpreted the said Regulation to mean that, notwithstanding absence of an agreement between the Appellant and the first Respondent, the Appellant was obligated to bank 100% of the energy injected by the first Respondent into the grid. This construction, on a literal interpretation of sub clause (ii), does not appear to be sound, and may necessitate the order under appeal being set aside on this score. The fact, however, remains that the Appellant has entered into agreements with the first Respondent to bank 100% power with respect to 10 of its 13 captive users. As to why the Appellant chose to place a fetter on banking upto 25%, only with respect to the other 3, is not known.

Mr. Sitesh Mukerjee, learned Counsel for the Appellant, would submit that the justification for this deviation is required to be placed by the Appellant before the Commission, and it is primarily because the Commission had misconstrued the applicable Regulations that the Appellant has come in appeal before this Tribunal. We find considerable force in this submission of the learned Counsel, and are inclined to remand the matter back to the Commission to enable the Appellant herein to put forth their submissions justifying their deviating from their agreements, entered into with the first Respondent in relation to 10 of its captive users, with respect to the other 3.”

Thus, this Tribunal, in its order dated 31.01.2023, held that an agreement between the parties seeking banking facilities and the party providing them is necessary in line with the CRE Regulation 2019, and as the Appellant has already signed an agreement with 100 % banking facility with respect to 10 out of its 13 customers of Respondent No.1 and the

Appellant offered to sign the agreement with rest of the three customers of Respondent No 1 with 25 % banking facility, the Tribunal remanded the matter to UPERC for its “consideration afresh on the submissions of Appellant justifying their action in deviating from the earlier agreements entered into with the first respondent in relation to 10 of its captive users to bank 100 % energy, and why they chose to restrict banking to the other three captive users, only to 25 %” . The scope of remand order was confined to ascertaining the justification for such differentiation being offered by the Appellant to the balance three customers of Respondent APCL vis-à-vis its balance ten Captive OACs. Accordingly, the sole issue that arises for our consideration is whether the Appellant is justified in differentiating the banking arrangement for three customers of Respondents No.1 at 25%, as opposed to the 100% banking arrangement, which was provided for its ten Customers, and consideration of same by the State Commission while passing the impugned order dated 23.06.2023 after remand order of this Tribunal dated 31.01.2023.

37. Learned counsel for the Appellants submitted that the Agreement with 10 out of 13 customers were signed between 01.10.2020 to 01.10.2021, prior to the order dated 16.11.2021 passed by the State Commission in Petition No 1761 of 2021 in the case of AmpSolar Technology Private Limited & Ors. V. UP SLDC & Ors. (**AmpSolar Judgement**), wherein the State Commission for the first time defined the Peak hours as 18.00 Hours to 00.00 hours (6 hours) and Off Peak hours as 00.00 hours to 18.00 Hours (18.00 hours) for the purpose of Banking under CRE Regulation 2019. Prior to the AmpSolar Judgement, in the absence of declaration of Peak and Off Peak Hrs under CRE Regulation 2019, 4 TOD slots as per the Tariff Order were followed for Banking Purposes. Learned counsel for the Appellants also contended that under earlier four TOD slot dispensation, if there was no generation of

electricity in a particular slot of 6 Hours, then there would be no banking and withdrawal of energy applicable during that slot and supply of energy to the captive customers of Respondent No.1 would be by DISCOM as regular supply at retail tariff of approx. Rs 8/kwh. After the AmpSolar judgment dated 16.11.2021, Banked Energy in this off peak hours of 18 Hrs duration, can be withdrawn at any time, and which has financial ramification for the Appellant as during some period in this 18 Hrs off Peak period, the prices in the spot market are as high as Rs 12/Kwh, while the 6 % banking charges paid on Nominal basis do not compensate the Appellants for the backup supply arranged by them. Therefore, to safeguard the commercial interests of the corporation and ultimately of the consumers in the State, the proposal of Banking was suitably modified. Learned counsel for Appellant submitted that these contentions were placed before the commission vide an affidavit dated 08.05.2023 before the final hearing held on 11.05.2023, and the Respondent No.1 had sufficient time to respond since additional written submission were filed by Respondent No 1 only on 29.05.2023. The learned Counsel for the Appellants also disputed the observation made in the impugned order that based on UPPPCL submission, that banking to the extent of maximum 85 % has been availed and therefore banking for the three captive users should be restricted to 85%, such a statement was never made by the Appellant.

38. The learned counsel for the Respondent No. 1 submitted that the reliance placed by the Appellant on the Ampsolar Judgement, asserting that the issue relating to TOD slots peak and off peak hours was settled by the commission only on 16.11.2021, is an afterthought. As such, the Appellant was not aggrieved by the peak and off-peak hours declared by the Commission in the AmpSolar Judgement dated 16.11.2021. The learned counsel for Respondent No. 1 has disputed both the grounds professed by

the Appellant during the remand proceedings; firstly, UPPCL has to arrange for costly power to supply banked energy to the captive users at a time when UPPCL/UP Discoms are experiencing peak demand as no details of alleged additional cost or losses were presented before the commission, even during Remand proceedings; secondly, the three captive users did not need banking up to 100 % is also unfounded. It was further contended by the learned counsel for Respondent No. 1 that the AmpSolar judgement did not introduce any new mechanism of TOD for Banking, rather Peak/Off Peak approach was already existing under the CRE Regulation.

39. The learned counsel for Respondent No. 1 also submitted that there is no loss incurred by the Appellant on account of the AmpSolar judgment, and any contentions to the contrary is misleading. In fact, the Appellant is making Net profit of Rs 22.31 Lacs per MW per annum on the banked power (if banking was allowed up to 100 %). It was also submitted that there is no requirement for procurement of additional power by the Appellant from exchange for supplying banked power, as the captive consumers of AGPPL are also the consumers of UPPCL/UP DISCOMs with individual Contract demands and UPPCL was required to tie-up long term PPAs with generators for such consumers for meeting the power supply requirement of these consumers. If the consumers were not drawing banked power, the same power would have to be supplied by the Discom under the contract demand without any additional cost.

40. We note from the Regulations 31 a (iii) of CRE Regulations 2019 that the withdrawal of banked power is permitted as per TOD system i.e. the withdrawal of power in the Peak /off-peak hours, as reproduced below:

31. Banking of Power

a) Renewable Energy source based Generation and Co-Generation Plants/ Captive RE:

iii. Withdrawal of banked power shall be allowed only as per TOD system i.e. withdrawal of power in the peak/off-peak hours shall not be more than the power banked in that respective TOD slot.

We agree with the Contentions put forth by Respondent No. 1 that TOD slot of Peak and Off-Peak Hours were already stipulated in the CRE Regulations 2019 and that nothing new has been introduced in AmpSolar Judgement dated 16.11.2021. However, we note from the CRE Regulations 2019, that Peak Hours and Off-Peak hours have not been defined like what duration of the day will constitute Peak Hours and what duration of the day will constitute Off Peak hours. These are described as:

V. "Peak Hours / Off Peak Hours" means the hours declared as such by the State Load Despatch Centre from time to time unless specified by an Order of the Commission;

41. It is also noted that prior to the AmpSolar Judgement dated 16.11.2021, Peak and Off-Peak hours were not declared /specified by either the State Load Despatch Centre or State commission, a fact not disputed by Respondent No1; the peak and off peak hours were thus specified for the first time by the commission vide AmpSolar Judgement dated 16.11.2021, as under:

Peak Hours : 18.00 Hrs to 00.00 Hrs (6 Hrs)

Off-Peak Hours: 00.00 Hrs to 18.00 Hrs (18 Hrs)

42. The important query that emerges for our consideration is what TOD slots should be considered for the banking of power and its withdrawal in the

absence of a declaration of Peak and Off-Peak hours by either the State Load Despatch Centre or the State Commission. This issue has been clarified by the State Commission in statement of Reasons (CRE Regulations 2019), as given below:

Particular	Comment of the stakeholders	Commission's view
Peak/ off peak hours	<p>Sri RS Awasthi submitted that the Regulations define peak/off peak hours as hours specified by the SLDC. However, no such notification is being done by the SLDC. Under the circumstances we presume that the hours as defined by the commission under the retail tariff Order for the Discom are being considered for the energy accounting and billing purposes.</p> <p>The commission is accordingly requested to clarify the position and, if required, issue necessary amendment in the Regulations/tariff Orders of the Commission.</p>	<p>CRE Regulations has the following definition:</p> <p><i>"Peak Hours/Off Peak Hours" means the hours declared as such by State Load Despatch Centre from time to time unless specified by an Order of the Commission,"</i></p> <p>So, in case it is not declared by an Order of the Commission, then it will be as per the definition of SLDC. Otherwise, it will be as per the hours defined under the Tariff Order issued by the Commission.</p>

Thus, in the absence of declaration of Peak and Off-Peak hours for CRE Regulations 2019, it was clarified by the commission that it will be as per hours defined in Tariff order issued by the commission, according to which there were four TOD slots as given below :

Hours	TOD
05:00 Hrs to 11:00 Hrs	TOD 1

11:00 Hrs to 17:00 Hrs	TOD 2
17:00 Hrs to 23:00 Hrs	TOD 3
23:00 Hrs to 05:00 Hrs	TOD 4

As submitted by the Learned counsel for the Appellant, the above four slots were considered for the Banking and Withdrawal of energy prior to the State Commission Order dated 16.11.2021, which is a fact not disputed by the learned Counsel for Respondent No 1.

42. We therefore, note that there is change in number of slots/ hours for Banking and withdrawal of Energy prior to 16.11.2021, when the Banking Agreement with 100 % banking arrangement was signed by the Appellant with 10 Captive consumers of Respondent No. 1 *vis-a-vis* post 16.11.2021 when Banking Agreement is to be signed for the remaining 3 Captive consumers of Respondent No 1. It has already been held by this Tribunal in its order dated 31.01.2023 that in line with Regulation 31 of CRE Regulations 2019, there is a pre-requisite of agreement between the parties involved for Banking and withdrawal of Energy so banked. Therefore, on limited issue of justification for differentiating the banking arrangement for the balance three captive customers of Respondent No 1, we would like to consider how description of Peak and Off Peak hours post AmpSolar judgement has adversely affected the interest of the Appellant, so as to offer only 25% banking to the balance three Captive customers of Respondent No. 1.

43. We observe that in case four slot system is used for banking, then for the 6 hourly slot specially TOD 3 (17.00 hrs to 23.00 hrs) and TOD 4 (23.00 Hrs to 05.00 Hrs), there was no banking of energy possible, then withdrawal of banked energy is also not permissible and ultimately the DISCOM would provide them energy at retail tariff, just like it provides to its any other

consumer which is generally priced at about Rs 8/ Kwh, as also submitted by learned counsel for the Appellants. With the declaration of off peak time slot as that of 18 hrs (00.00 Hrs to 18.00 Hrs), which encompasses about three time slots considered earlier, energy banked at any time during this 18 hrs period can be withdrawn at any time during this period, obviating the need to purchase power from Discom, and therefore having adverse financial implications on Discom. We do not feel that it is necessary to delve into the other contentions put forth by learned counsel for the Respondent No. 1 like profit being made by Appellant even if 100 % banking is allowed and no details about the loss being incurred by Appellant has been submitted, as the limited issue in remand order is about justification of the Appellant in offering different Banking percentage for three captive Customers vis a vis ten captive customers of Respondent No. 1.

44. We do not find force in the submission of learned Counsel for Respondent No.1 that since Respondent's captive customers are also DISCOMs consumers, the Appellant is required to have long-term PPAs with generators to meet these consumers' power need, so there is no additional financial burden even if 100% banking is allowed as withdrawal of banked energy obviate the liability of payment of charges, at retail tariff of energy consumed, which otherwise could have been charged by DISCOMs at about Rs 8/Kwh, but it is an adjustment against the energy banked during any time in 18 hrs period. Moreover, as per the CRE Regulations 2019, the agreement between the parties is a prerequisite for deciding the percentage for Banking and withdrawal of energy. As submitted by the learned counsel for the Appellant and also acknowledged by the learned counsel of Respondent, the justification of differentiating between three captive customers *vis a vis* balance ten were put forth by the Appellant before the State commission during remand proceedings. Learned counsel for the

Appellant has also drawn our attention to the written submissions of the Appellant filed before the commission during hearing of original petition of Respondent (Petition number 1832 of 2022) that how declaration of off peak hours of 18 Hrs by the State commission in its order 01.12.2021 in petition No 1757 of 2021 (filed by Respondent No1) has financial impact, therefore it is offering 25 % of Banking for three captive customers of Respondent No.1. Thus, we do not find merit in the submissions made by learned counsel for the Respondent that reference to AmpSolar judgement dated 16.11.2021 declaring off Peak hours of 18 hrs duration and peak hours of 8 hrs for Banking and withdrawal of energy is an afterthought of Appellant put forth before this Tribunal as well as during remand proceedings before the commission. Learned counsel for the Appellant, as such, has not disputed the peak and off-peak hours declared by state commission vide AmpSolar judgement dated 16.11.2021, but reserving its right to agree for reduced percentage of banking with all the solar generators post this order in line with CRE Regulation 2019. We also note from the submission of the Learned counsel for Appellant that they are proposing 25% banking for all RE CGPs post AmpSolar judgement dated 16.11.2021, which includes three of the captive customers of Respondent No 1.

45. Based on the above deliberation, we are satisfied that, with the AmpSolar judgement dated 16.11.2021, vide which the Commission has described the time period to be considered for Peak and Off-Peak hours (2 TOD slot) under CRE Regulations 2019 for Banking and Withdrawal of energy, has created different scenario which existed before 16.11.2021 where 4TOD slots as per Tariff order was considered for Banking and withdrawal of energy when agreement for 10 Captive customers of Respondent No.1 was signed. The State Commission, in the Impugned

order, has erred in not considering the justification put forth by the Appellant and based on maximum energy banked has directed the Appellant to sign Banking Arrangement with 85 % Banking for balance three captive customers; while as per CRE Regulations 2019, the banking agreement is to be as per Agreement between parties and not based on direction by the State Commission. As held above, we agree with the justification provided by the Appellant that post AmpSolar Judgement dated 16.11.2021, time slots i.e., Peak Hours of 8 Hrs and Off Peak hours of 18 hrs, to be considered for Banking and Withdrawal of Energy has undergone a change as compared to the period before 16.11.2021 when 100 % Banking agreement were signed with 10 Captive customers of Respondent No.1 wherein 4 TOD slots of 6 hrs each (as per Tariff order) was being used for Banking and withdrawal of energy.

46. In view of the above deliberation, we set aside the order dated 23.06.2023 passed by the State Commission. The appeal is accordingly allowed. All the pending IAs shall stand disposed of.

Pronounced in open court on this the 7th day of August, 2024

(Seema Gupta)
Technical Member(Electricity)

(Justice Ramesh Ranganathan)
Chairperson

ts/ag/dk