

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)
APPEAL No. 168 of 2020 & IA No. 1818 of 2024

Dated: **8th May, 2025**

Present: **Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**
 Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF

PTC India Ltd.
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110066.

....Appellant(s)

Vs.

1. Central Electricity Regulatory Commission
 Through its Secretary,
 3rd and 4th Floor, Chanderlok Building, 36,
 Janpath, New Delhi – 110001.

2. Adhunik Power and Natural Resources Ltd.
 Through its Managing Director,
 9B, 9th Floor, Hansalaya Building,
 15, Barakhamba Road,
 Connaught Place,
 New Delhi – 110001.

3. Tamil Nadu Generation and Distribution Corporation Ltd.
 Through its Chairman & Managing Director,
 NPKR Maligai, 6th Floor,
 Eastern Wing, Anna Salai,
 Chennai – 600002, Tamil Nadu.

....Respondent(s)

Counsel for the Appellant(s) : **Mr. Ravi Kishore**

Mr. Niraj Singh
Ms. Prerna Singh
Ms. Rajshree Chaudhary

Counsel for the Respondent(s) : Mr. Deepak Khurana
Mr. Vineet Tayal
Mr. Abhishek Bansal
Mr. Tejasv Anand for R-2

Ms. Anusha Nagarajan for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. This Appeal has been filed by M/s. PTC India Limited challenging the Order dated 15.08.2020 ("Impugned Order") passed by the Central Electricity Regulatory Commission ("Commission" or "CERC") in Petition No. 158/MP/2019 holding that PTC is liable to pay the amount deducted/withheld by TANGEDCO toward capacity charges and penalty along with late payment surcharge to Respondent No. 2 and PTC is entitled for similar amount from TANGEDCO.

Description of Parties

2. The Appellant, PTC India Ltd. is a company engaged in trading electricity having its registered office on the 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi – 110066.

3. Respondent No.1, Central Electricity Regulatory Commission (“CERC”) is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 inter-alia vested with the function of adjudicating the issue in hand.
4. Respondent No.2, Adhunik Power and Natural Resources Ltd (“APNRL”) is a generating company that owns, operates, and maintains the 540 MW (2X270 MW) Thermal Power Project located in the State of Jharkhand.
5. Respondent No.3, Tamil Nadu Generation and Distribution and Corporation Ltd (“TANGEDCO”) is a Company wholly owned by the Tamil Nadu Government and is engaged in the business of generation and distribution in the State of Tamil Nadu.

Factual Matrix of the Case

6. The Appellant has filed the present Appeal under section 111 of the Electricity Act, 2003, challenging the order dated 15.08.2020 passed by the CERC and seeking direction to set aside/quash the Impugned Order dated 15.08.2020 passed by the Commission against the Appellant, PTC India Ltd in Petition No. 158/MP/2019.
7. The facts of the case as submitted by the Appellant are noted hereafter.
8. Respondent No. 3, TANGEDCO, conducted a competitive bidding process under Case-I bidding for long-term power supply. The Appellant, PTC India Ltd., participated in the bid with support from Respondent No. 2, Adhunik Power and Natural Resources Ltd.

9. As per the Standard Bidding Document, PTC, a licenced electricity trader under the Electricity Act, 2003, could only participate on behalf of a generator with exclusive authorization. Accordingly, PTC submitted the necessary details of the APNRL and an Exclusive Power Purchase Agreement (PPA) dated 04.03.2013.

10. Upon being declared the successful bidder, PTC executed a Procurer-PPA with TANGEDCO on 18.12.2013 for the supply of 100 MW from the APNRL project. Subsequently, on 19.12.2013, PTC entered into a back-to-back PTC-PPA with APNRL, which explicitly incorporated the terms of the Procurer-PPA and annexed it.

11. The Procurer-PPA designated APNRL's project as the power source and recognized PTC's role solely as a trader. Power supply from APNRL's project to TANGEDCO commenced on 01.01.2016.

12. Later, APNRL participated in the Ministry of Coal's SHAKTI scheme and offered a tariff discount of three paise per kWh, directly applicable to TANGEDCO and merely passed through PTC. PTC initially made payments for energy bills raised by APNRL using its resources.

13. However, TANGEDCO failed to fulfill its payment obligations under the Procurer-PPA, causing delays and financial strain on PTC, which was compelled to suspend payments to APNRL. Additionally, TANGEDCO failed to establish the required Letter of Credit (L/C) as a Payment Security Mechanism under the Procurer-PPA, leading PTC to withhold issuing an L/C in favor of APNRL.

14. After persistent follow-ups, TANGEDCO issued an L/C on 22.02.2019, but it contained technical defects. The issue was raised, and a revised L/C was issued to PTC on 01.08.2019, following which PTC promptly issued an L/C to APNRL on 02.08.2019.

15. On 11.12.2018, Respondent No. 2, APNRL informed the Appellant that due to delays in payment and the issuance of the Letter of Credit (L/C), it might invoke the provisions of the PTC-PPA to sell 25% of the contracted power to third parties.

16. As per the Procurer-PPA, both PTC and APNRL had the right to offer up to 25% of the contracted quantum to third parties. Subsequently, through a letter dated 18.12.2018, APNRL claimed that under the amended Article 8.5.5 of the PTC-PPA, it had the right to offer 100% of the contracted capacity to third parties.

17. Exercising this right, APNRL invoked the relevant provision and requested to sell the total contracted power to third parties effective from 0000 Hrs on 20.12.2018. Under Article 6.5 of the PTC-PPA, APNRL and PTC were required to make joint efforts to sell the contracted capacity to other buyers as per the Procurer-PPA terms.

18. Any surplus from such sales accruing to PTC was to be passed on to APNRL after deducting PTC's trading margin. Additionally, any capacity charges received from the procurer for this capacity were to be transferred to APNRL.

19. However, no third-party sales were executed through PTC, and APNRL independently sold power to third parties from 20.12.2018 onwards. During

December 2018, January 2019, and February 2019, APNRL supplied only a small quantum of power to Respondent No. 3, TANGEDCO, through PTC.

20. Due to APNRL's failure to supply the full contracted power during this period, TANGEDCO withheld capacity charges for the defaulted electricity and imposed penalties on APNRL for non-supply.

21. Respondent No. 2 filed Petition No. 158/MP/2019 before CERC, seeking the release of amounts deducted by TANGEDCO and requesting a direction to PTC and TANGEDCO to jointly and severally make the payment.

22. On 15.08.2020, CERC issued the Impugned Order directing PTC and TANGEDCO to release the deducted amount along with a late payment surcharge.

23. However, CERC held that PTC was liable to make the payment, including the surcharge, even without receiving the corresponding amount from TANGEDCO.

24. While acknowledging that the PPAs were back-to-back, CERC effectively delinked the payments, treating the agreements as if they were on a principal-to-principal basis. Moreover, CERC did not examine whether Respondent No. 2 had sold power to third parties or, if so, at what rate such sales were made.

25. Thus, being aggrieved by the Impugned Order dated 15.08.2020 passed by CERC in Petition No. 158/MP/2019, the Appellant has preferred the present Appeal.

Written Submissions of the Appellant

26. The Appellant submitted that it challenged the CERC order dated 15.08.2020, primarily on two grounds:

- a) While the CERC recognized that the Procurer-PPA and PTC-PPA were back-to-back agreements, it still held the Appellant liable to pay Respondent No.2, with the right to recover the same amount from Respondent No.3.
- b) The CERC misinterpreted Article 8.5 of the PPA by imposing liability without determining whether Respondent No.2 sold power to a third party or if the capacity was available during the relevant period, which is essential for adjudicating Respondent No.2's claim.

27. Additionally, the CERC ruled that Respondent No.2 was entitled to a refund of capacity charges, including penalties withheld or deducted by Respondent No.3/ Appellant for the periods of December 2018, January 2009, and February 2009.

PTC-PPA and Procurer-PPA are on a back-to-back basis

28. The Appellant submitted that CERC, in its order, explicitly found that the Procurer-PPA and PTC-PPA were back-to-back agreements. Despite this, it erroneously directed the Appellant to pay Respondent No.2 and recover the amount from Respondent No.3, instead of directing Respondent No.3 to pay the Appellant, who would then remit the payment to Respondent No.2.

29. Additionally, Respondent No.2 had previously approached the CERC seeking relief directly from TANGEDCO, as noted in Paras 18, 19, 20, and 21 of the order.

30. As the PPAs are on a back-to-back basis, the Appellant was acting like a conduit/ intermediary in the whole transaction. This has been held so in the following cases:

a) ***PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Others***, Appeal No. 88 of 2010 decided by this Tribunal on 11.01.2011:

“52. A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case the generating company proposes to sell power of a trading licensee which has back to back agreement for resale of power to a distribution licensee outside the State of Uttarakhand.”

b) ***Lanco Power Ltd. v. Haryana Electricity Regulatory Commission and Other***, Appeal No. 51 ND 52 of 2011 decided by Tribunal on 04.11.2011:

“21. ... A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on

the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.”

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61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created. 62. In other words, while interpreting the provisions of the Act, the entire Act will have to be looked into totality as one integral whole and not in an isolated manner. That is why; the Act itself does not seek to look at the electricity industry and the consumer interest on a segmented or fragmented basis but as cohesive whole. It is for this reason that the Act has been given in Section 174 overriding effect over all the other legislations which are inconsistent with the provisions of the Act.

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68. Therefore, the Appellant's present stand that they are two distinct documents is quite contrary to the earlier stand taken by the Appellant.

79. In view of the above, it has to be concluded that the PPA and PSA in the present case are two inter dependent documents and only State Commission has the power to fix the tariff for purchase of power by the PTC from the Appellant for the re-sale to the Haryana Power (R-2) under PSA for the distribution to the consumers in the State of Haryana.

c) **PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Others, Appeal No. 168 of 2014** decided by Tribunal on 31.08.2011:

"8. ... PTC is a trading licensee which has been given a license for inter-state trading of electricity by the Central Commission. PTC has signed back-to-back PSA with PSEB for re-sale of the entire power under which it has a legal obligation to supply power. A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case, the generating company proposes to sell power to a trading licensee which has back-to-back arrangement for re-sale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power purchased from the trading licensee with power purchased from other sources and supply the same to the consumers. Thus, the power is ultimately going to be consumed by the consumers outside the State."

31. Further, the Delhi High Court in the case of ***PTC India v. Jaiprakash Power Ventures Ltd., (2012) 130 DRJ 351***, held as under:

“61. The APTEL's decision in Lanco III is instructive. The facts in brief were that Lanco was a generating company which entered into a PPA with Power Trading Corporation (PTC) for sale of 273 MW electricity from its Korba thermal power project in Chhattisgarh. The Haryana Power Generation Corporation Ltd. (HPGCL) approached the Haryana Electricity Regulatory Commission (HERC) for approval of purchase of power from Lanco's plant. An in-principle approval was granted by the HERC for purchase of power from Lanco's plant through PTC. A power Sale Agreement (PSA) was entered into between PTC and HPGCL for sale of the power purchased from Lanco. HPGCL approached the HERC for approval of the PSA. The HERC granted approval. Later PTC filed a petition before the HERC seeking a direction to HPGCL to purchase electricity at the tariff calculated in accordance with the CERC Regulations and the PSA to regulate the tariff. Among the objections raised by Lanco was that HERC lacked the jurisdiction to approve the tariff for purchase of electricity by PTC, an inter-state trading licensee, from Lanco which had its plant in Chhattisgarh. The decision of the HERC, negating the said objection, was challenged by Lanco before the APTEL. While upholding the said part of the order of the HERC, the APTEL observed:

So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company. ...”

32. The Tribunal's established legal position aligns with the understanding between the parties, as evidenced by Respondent No.2's email dated 29.06.2021, wherein it expressly stated that PTC should release APNRL's claim of ₹33.65 crore with late payment surcharge only after receiving the corresponding payment from TANGEDCO. This confirms that Respondent No.3 is ultimately liable for the payment.

33. Moreover, Respondent No.3 did not dispute Respondent No.2's claim before the CERC. Given the settled law, Respondent No.2's acknowledgment, and Respondent No.3's non-contestation of liability, the CERC's decision to impose payment responsibility on the Appellant, with a right to recover from Respondent No.3, is erroneous.

34. Such an approach leads to unnecessary litigation, contrary to the Hon'ble Supreme Court's view that multiple litigations should be avoided. Additionally, in **Transmission Corporation of India Ltd. v. GMR Vemagiri Power Generation**

Ltd. (2018) 3 SCC 716, the Hon'ble Supreme Court emphasized that contractual interpretation should not contradict the understanding between the parties.

Interpretation of Clause 8.5 of the PPA

35. The Appellant submitted that as per Clause 8.5 of the Procurer-PPA and the corresponding provision in the PTC-PPA, Respondent No.2 was required to take specific steps in case of non-payment by Respondent No.3 or the Appellant. Under Article 8.5.7, Respondent No.2 had the right to sell power to third parties, with any revenue earned to be adjusted against the tariff.

36. However, the CERC, while determining the liability of Respondent No.3 and the Appellant, failed to examine whether Respondent No.2 had sold power to third parties and received payments, which should have been offset against its claim.

37. Furthermore, the CERC did not assess whether the capacity for which Respondent No.2 sought capacity charges was available. If the plant was inoperative, Respondent No.2 would not be entitled to such charges.

38. Additionally, in Petition No. 264/MP/2022, filed under Section 142 of the Electricity Act, Respondent No.2 disclosed facts indicating that its plant's capacity was not available during the relevant period, contradicting its claim.

39. Given these facts and the settled legal position, the present appeal should be allowed, or any other appropriate relief may be granted in the interest of justice.

Written Submissions of Respondent No. 2, Adhunik Power and Natural

Resources Ltd.

PTC's contention is that CERC has held that Procurer-PPA and PTC-PPA are on back-to-back basis, therefore, PTC cannot be held liable for payment without receiving the same from TANGEDCO

40. Respondent No. 2 submitted that PTC has contended that it cannot be held liable to pay APNRL without first receiving the corresponding payment from TANGEDCO, as the PTC-PPA explicitly references and incorporates the terms of the Procurer-PPA. It asserts that the back-to-back arrangement constitutes a single transaction. As a power trader, PTC argues that it serves only as an intermediary between the generator and the Discom. It emphasizes that both PPAs are inextricably linked, with the PTC-PPA facilitating power supply from APNRL's project to TANGEDCO. PTC further maintains that the PTC-PPA and Procurer-PPA are co-terminus, meaning that one cannot be enforced independently of the other, and any provision in the PTC-PPA must be enforced simultaneously with its corresponding provision in the Procurer-PPA.

41. With regards to the above, submitted that the CERC in the Impugned Order has correctly interpreted the relevant provisions of the PPA/PSA and has arrived at correct findings and conclusions while dealing with the above submissions made by PTC. The reasoning given by the Commission in Paras 27, 29, 30, 31, 33, and 34 of the Impugned Order in this regard is logical in accordance with settled principles of law and therefore, sustainable. The said Paras are reproduced hereunder: -

“27. In terms of Articles 6 and 8 of the PTC-PPA, PTC is required to pay to the Petitioner as per the tariff agreed under Procurer-PPA minus its trading margin. Also, PTC is required to pay towards the supply of power to the Petitioner by the Due Date, as defined under the Procurer-PPA, plus one day. In terms of Article 8.4, PTC is required to provide adequate payment security to the Petitioner, inter-alia, by providing Stand by Letter of Credit/ Bank Guarantee. In terms of Article 8.4.11.1, PTC is required to provide Stand by Letter of Credit to the Petitioner 25 days before the Scheduled Delivery Date under Procurer-PPA and to be renewed annually for an amount as specified in Article 8.4.11.2. PTC is also required to restore and renew the Stand by Letter of Credit, from time to time as per Articles 8.4.11.3 and 8.4.11.5.

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29. The above Articles in Procurer-PPA are mostly on the lines of PTC-PPA with minor changes in the time frame such as 'Due Date', furnishing/ reinstating of LC, etc. indicating their back-to-back nature and inter-connectedness thereby implying that TANGEDCO is liable to pay to PTC and that PTC is liable to pay to the Petitioner. However, payment to the Petitioner by PTC including furnishing LC in favour of the Petitioner is not conditional upon the payment to be made and furnishing of LC by TANGEDCO to PTC.

30. PTC has contended that since PPAs are back-to-back in nature, the financial obligations of PTC qua payment against supply of power and furnishing of LC under PTC-PPA is subject to the payment and

furnishing of LC by TANGEDCO under Procurer-PPA. PTC has further contended that it is not functioning as a Merchant Trader in the instant case and its role is that of an intermediary between the Petitioner and TANGEDCO without taking upon itself the financial and commercial risks. In support of its contentions, PTC has relied upon various judgments of APTEL and Hon'ble High Court of Delhi.

31. It is not in dispute that the terms of PPAs i.e. PTC-PPA as well as Procurer PPA make it clear that supply to TANGEDCO is from an identified source i.e. the Petitioner's generating station and that end consumer/ ultimate beneficiary of the Petitioner's generating station to the extent of 100 MW is TANGEDCO. Also, as noted above, both the PPAs are back-to-back in nature and are inextricably linked. However, having said that, in our view in terms of provisions of Articles 6 and 8 of the PTC-PPA, it does not follow that the payment obligation of PTC to the Petitioner is conditional upon corresponding obligation of TANGEDCO. The commercial and financial risk undertaken by trader has to be ascertained from the express provisions of the PPAs, which in present case clearly establish that they are not conditional as claimed by PTC. We also note that in PTC-PPA, PTC has suitably modified timeframe for various financial obligations qua the Petitioner such as 'Due Date' for payment of invoices, for furnishing/ reinstating of LC, etc., which appears to be solely for the purpose of safeguarding/ limiting its commercial and financial risks.

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33. *PTC has argued that it cannot make payment indefinitely from its own resources. The rights/ remedies available to the Petitioner under PTC-PPA are on back-to-back basis of rights/ remedies available to PTC under Procurer-PPA. Perusal of the provisions of Procurer-PPA clearly indicates that PTC has appropriate remedy available in case TANGEDCO fails to provide LC or make timely payments of dues for the energy supplied. Needless to say, both PTC and TANGEDCO have failed in making payment to the Petitioner against bills raised and providing LC in terms of the PTC-PPA/ Procurer-PPA and the same has led to filing of this Petition.*

34. *Thus, in our view, in terms of the provisions of the PTC-PPA, the Respondent PTC is liable to make payment to the Petitioner for electricity supplied to TANGEDCO and also provide LC to the Petitioner in terms of the PTC-PPA.”*

42. PTC has failed to point out any error in the aforesaid findings rendered by the CERC in the Impugned Order. Further, PTC has failed to show any provision in the PPA which absolves PTC from undertaking any risk whatsoever, as contended by PTC.

PTC merely acts as an intermediary/ facilitator

43. PTC has relied on the definition of "trading" under the Electricity Act, 2003, to argue that trading is a distinct activity. It contends that as a trading licensee, it acts merely as a conduit between the generating company and the distribution licensee, citing several judgments, including;

- a) PTC India v. Jaiprakash Power Ventures Ltd. (2012) 130 DRJ 351;
- b) PTC India Limited v. Uttarakhand Electricity Regulatory Commission and Others reported as (2011) ELR (APTEL) 81;
- c) Lanco Power Limited v. Haryana Electricity Commission and Others reported as (2011) ELR (APTEL) 1714;
- d) PTC India Limited v. Uttarakhand Electricity Regulatory Commission and Others reported as (2016) ELR (APTEL) 1176;

44. PTC maintains that it is not a merchant trader but an intermediary facilitating electricity supply under agreed terms while earning a trading margin. It argues that being held liable for payment without receiving the corresponding amount from TANGEDCO exposes it to undue financial risk.

45. However, these contentions are erroneous. The CERC, in the Impugned Order, has correctly interpreted the PPA/PSA provisions and reached a just conclusion. PTC has failed to identify any PPA provision that completely shields it from financial risk.

46. As a power trader, PTC has a crucial risk-mitigation role, as recognized in the CERC Trading Licence Regulations, 2020 and its Statement of Reasons. Despite charging a trading margin, PTC did not fulfill its obligations, including opening a Letter of Credit ("LC") facility in favor of APNRL and ensuring timely payments for electricity supplied under the PTC-PPA.

47. The judgments cited by PTC in the Appeal are distinguishable and irrelevant to the present matter. APNRL has addressed them as follows:

- a) In PTC India v. Jaiprakash Power Ventures Ltd. (2012) 130 DRJ 351, the issue was whether the CERC had exclusive jurisdiction over disputes or if the Arbitral Tribunal could adjudicate them. Since the present case concerns the interpretation of PPA provisions on billing and payment rather than jurisdiction, this judgment is inapplicable.
- b) Similarly, in PTC India Ltd. v. Uttarakhand ERC & Ors. [2016 ELR (APTEL) 1176], the dispute revolved around determining which State Commission had jurisdiction over the parties' claims. The role of PTC was discussed in that context. However, the present case pertains to the interpretation of payment security mechanisms in the PPA, making the reliance on this judgment misplaced.
- c) Lanco Power Ltd. v. HERC & Ors. [2011 ELR (APTEL) 1714], the issue was determining which State Commission had jurisdiction over disputes under the PPA/PSA, based on the nature of the transaction. Since the present case concerns the interpretation of the Payment Security Mechanism in the PPA, this judgment is irrelevant.
- d) Lanco Budhil Hydro Power Pvt. Ltd. v. HERC & Ors. (Appeal No. 188 of 2011, Judgment dated 09.08.2012), the dispute was about whether the State Commission had jurisdiction over a termination notice issued by one party. This has no bearing on the current matter, which deals with the interpretation of specific PPA provisions regarding payment security.

Order dated 19.08.2019 passed in Petition No. 17/MP/2019

48. PTC has relied on the CERC order dated 19.08.2019 in Petition No. 17/MP/2019, arguing that APNRL had previously sought compensation for the change in law events only from TANGEDCO. Therefore, PTC contends that the present claim should also be directed solely against TANGEDCO and not PTC.

49. However, this argument is factually incorrect. A review of prayer (b) in the said petition shows that APNRL had sought payments from both PTC and TANGEDCO. Moreover, in Petition No. 17/MP/2019, TANGEDCO did not dispute its liability on the ground that it was not a party to the PTC-PPA. This issue was raised only in the present case and was adjudicated upon by the CERC.

Letter dated 29.06.2021 by APNRL to PTC

50. PTC has submitted a letter dated 29.06.2021 from APNRL, written after the Impugned Order, stating that APNRL was in discussions with TANGEDCO for the release of unpaid amounts. The letter also mentions that PTC and APNRL would jointly pursue TANGEDCO for payment in July 2021 on a best-effort basis and that PTC may release APNRL's claim of Rs. 33.65 crore, along with Late Payment Surcharge, after receiving payment from TANGEDCO.

51. However, PTC's reliance on this letter is misplaced. Despite CERC's order recognizing APNRL's entitlement to capacity charges and deducted penalties, no payments were made, forcing APNRL to take additional steps to recover its dues. The letter merely reflects APNRL's efforts to secure payment and does not override or nullify CERC's findings. It does not indicate a waiver of APNRL's rights but rather its attempt to recover legitimate dues for financial sustainability.

PTC's liability is limited to payment of Tariff and for other claims in respect whereof it does not receive trading margin, it has no liability to pay

52. PTC raised an oral argument, not previously pleaded before CERC or in the present appeal, asserting that it is not directly liable to pay the generator for amounts other than the tariff, such as change-in-law compensation, unless it receives payment from the Discom.

53. This argument lacks any foundation in pleadings and is untenable. The PTC-PPA does not distinguish between tariff payments and other financial obligations. Article 8 of the PTC-PPA, titled "Billing and Payment", governs the payment of Monthly Bills and Supplementary Bills, covering all payments under the agreement. The capacity charges claimed in this case fall within the scope of Article 8, as does the penalty deducted from APNRL's Monthly Bill. Thus, PTC's contention is meritless and contradicts the contractual framework.

Contracted power has been sold to third-party

54. PTC has relied on Article 8.5 of the PTC-PPA to argue that any surplus revenue earned from third-party power sales should be adjusted against outstanding dues. PTC contends that CERC erred in determining liability without requiring APNRL to demonstrate whether it sold power to third parties and without directing APNRL to disclose any surplus revenue earned from such sales.

55. However, this argument is beyond the scope of PTC's original pleadings before CERC and is legally unsustainable. In its reply to the petition before CERC,

PTC did not dispute APNRL's entitlement to payments. Since PTC did not raise this contention in the original proceedings, it is precluded from introducing it in the present appeal.

56. In this regard, it would be pertinent to extract Para 5 of the submissions filed by PTC before the CERC as under:

"5. At the outset, it is submitted that TANGEDCO has not denied non-payment dues. As such its liability to pay stands crystalised. TANGEDCO is taking hyper technical pleas to avoid its liability."

57. TANGEDCO's stand before the CERC is also important to note, as recorded in the impugned order under:

"8. The matter was heard on 21.5.2020. During the course of hearing, the learned counsel for the TANGEDCO submitted as under:

(a) TANGEDCO is not disputing the claims of the Petitioner."

58. Further, Para 25 of the Impugned Order is relevant, and the relevant extract is as follows:

"25. On the other hand, PTC has argued that TANGEDCO has not denied nonpayment of the Petitioner's dues. As such, its liability to pay stands crystalized and TANGEDCO is raising hyper-technical pleas to avoid its liability....."

59. In furtherance to the above, Para 40 of the Impugned Order is also relevant and is reproduced hereunder:

“40. The Petitioner vide its letter dated 11.12.2018 informed PTC regarding delay in payment of the monthly invoices by the due date as well as failure to provide LC in favour of the Petitioner. The Petitioner in the said letter also indicated that the Petitioner would be constrained to invoke provisions of Article 8.5.2 read with Article 8.5.8 of the PTC-PPA in case LC is not provided to the Petitioner and outstanding dues are not paid along with late payment surcharge. The Petitioner also informed PTC to consider the said letter as notice under Article 8.5.2 to enable PTC to take needful action. In response, PTC vide its letter dated 17.12.2018 contested the invocation under said Articles by the Petitioner only on the ground that the PPAs entered into between the parties are back-to-back in nature. It also forwarded the said letter of the Petitioner dated 11.12.2018 to TANGEDCO vide its letter dated 12.12.2018. Thus, requirement of notice in terms of provisions of the PPAs has been satisfied. Subsequently, the Petitioner vide its letter dated 18.12.2018, once again citing the outstanding dues and non-opening of LC, intimated to PTC that it would invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA and requested PTC to arrange for sale of total contracted capacity to third parties w.e.f. 20.12.2018.”

.....

42. It is not in dispute that there has been delay on part of the Respondents to make timely payment towards the invoices raised by

the Petitioner. TANGEDCO in its letter dated 4.1.2019 has clearly admitted that since it is facing severe financial crisis, payment towards energy bills under long-term PPAs are outstanding. TANGEDCO further informed that steps are being taken by it to mobilize funds through various sources and sequential payment will be maintained as and when financial position would improve. PTC in its various letters as well as submissions has taken a stand that since the PPAs are of back-to-back nature, the liability of PTC to make payment as well as furnishing of LC is subject to receipt of the same from TANGEDCO under Procurer-PPA.”

43. It is also not in dispute that neither payment security mechanism in the form of LC was provided to the Petitioner in terms of Article 8.4.11 of the PTC-PPA to cater to the invoices raised by the Petitioner, nor the invoices raised by the Petitioner were being paid by the due date in terms of the PPAs. Accordingly, in our view, the Petitioner was entitled to invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA which provides for third party sale of default electricity and consequently to receive the capacity charges towards such default electricity in terms of Article 8.5.8 of the PTC-PPA.

.....

46. In the foregoing paragraphs, we have already held that the Petitioner is entitled to refund of the capacity charges including the penalty withheld/ deducted by the Respondents, the same being contrary to the provisions of the PTC-PPA and Procurer-PPA.

Therefore, PTC is liable to pay such amount including the late payment surcharge in terms of Article 8.4.3 of the PTC-PPA. Further, PPAs being back-to-back in nature, PTC shall be entitled to the said amount from TANGEDCO in terms of Procurer-PPA and such payment shall be made by TANGEDCO to PTC with late payment surcharge in terms of provisions of the Procurer-PPA.”

60. PTC's attempt to dispute liability at this stage is legally impermissible, as it had already admitted liability before CERC and TANGEDCO. Any contrary argument is barred by the principle of estoppel.

61. Furthermore, APNRL, through its letter dated 23.11.2020, had requested payment of outstanding dues while duly adjusting ₹1,01,14,173 as surplus revenue under Article 8.5.7 of the PTC-PPA. This adjustment was made against the claimed capacity charges of ₹36,62,81,844 for December 2018, January 2019, and February 2019, as reflected in the REA Bills submitted before CERC.

IA No. 1818/2024 file by PTC for placing on record additional documents

62. PTC filed an application on 28.10.2024 to introduce additional documents related to proceedings in Petition No. 264/MP/2022 before CERC, which pertains to the enforcement of the order dated 15.08.2020, currently under challenge in this appeal.

63. APNRL opposed this application through a reply dated 22.11.2024. The present appeal is limited to assessing the legality and validity of the CERC order

dated 15.08.2020, whereas Petition No. 264/MP/2022 concerns its enforcement. These proceedings are distinct in scope and jurisdiction.

64. PTC, through its application, attempts to introduce arguments regarding the alleged non-availability of the plant to dispute its liability under the Impugned Order.

65. However, as established in prior submissions, both PTC and TANGEDCO had already admitted liability before CERC. Consequently, PTC is legally barred from challenging the same before this Tribunal. Given these circumstances, the present appeal is devoid of merit and ought to be dismissed.

Written Submissions of Respondent No. 3, TANGEDCO

No invoices have been raised upon TANGEDCO by PTC for the amount that is subject matter to the Impugned Order

66. Respondent No. 3 submitted that CERC in the Impugned Order directed PTC to pay APNRL the claimed amounts, recognizing the back-to-back nature of the PTC-PPA with APNRL and the TANGEDCO-PPA. PTC was permitted to recover the paid amounts from TANGEDCO.

67. However, PTC has not issued any invoices to TANGEDCO for the amounts directed by CERC. In an affidavit dated 16.05.2023 filed before CERC in the execution proceedings, PTC highlighted discrepancies between the invoices raised by APNRL on PTC and those raised by PTC on TANGEDCO. PTC explicitly

stated that it did not raise invoices based on a bona fide belief that the CERC order was under challenge before APTEL.

68. Consequently, TANGEDCO was never invoiced for the amount in question, and no occasion arose for it to make any payment. Although the PTC-PPA and TANGEDCO-PPA are back-to-back agreements, they contain distinct billing provisions. Under the PTC-PPA, APNRL must submit monthly bills to PTC within nine days of the following month, while PTC, under the TANGEDCO-PPA, must invoice TANGEDCO within ten days. Therefore, TANGEDCO is only liable for invoices raised by PTC, not those raised by APNRL. The independent existence of these agreements must be upheld, even if they are considered back-to-back.

69. TANGEDCO has consistently maintained that it cannot release payment to PTC without receiving a corresponding invoice. This position is evident from APNRL's letter to PTC dated 15.06.2021, wherein APNRL referred to discussions with TANGEDCO regarding the release of the amount covered under the impugned order. In the said letter, TANGEDCO reiterated that payment could only be made if PTC raised an invoice.

70. Furthermore, if PTC were to issue an invoice to TANGEDCO at this stage, as a reactive measure in response to TANGEDCO's position in the present appeal, it would cause undue prejudice to TANGEDCO. Had the invoices been raised in a timely manner, TANGEDCO could have factored the amount into the Electricity (Late Payment Surcharge) Rules, 2022 (LPS Rules). Raising invoices belatedly now deprives TANGEDCO of this opportunity, thereby impacting its financial planning and obligations.

Impugned Order passed without APNRL having submitted proof of sale of power to third parties – no details of availability of APNRL's plant available at the time of the Impugned Order

71. APNRL claimed capacity charges under Article 8.5 of the PTC-PPA for the non-supply period between December 2018 and February 2019, arguing that it had the right to stop power supply to PTC due to payment defaults and sell the power to third parties.

72. However, APNRL did not provide proof of such third-party sales before the CERC, which still allowed the claim in the Impugned Order. During the Execution Petition proceedings, CERC directed APNRL to explain discrepancies in its declared availability and RLDC records. In response, APNRL submitted data revealing that from 06.12.2019 to 07.02.2019, Unit-II of its plant was under forced outage, and from 14.01.2019 to 21.01.2019, Unit-I was also affected. Despite these outages, APNRL included the unavailable capacity in its invoices to PTC and claimed capacity charges for the same, even though this capacity could not have been sold to third parties. These crucial details regarding plant availability were not disclosed to the CERC at the time of the impugned order and only surfaced during the Execution Petition proceedings.

73. Under Order XLI Rule 27 of the Code of Civil Procedure, 1908, this Tribunal as the Appellate forum can take on record the above details:

“27. Production of additional evidence in Appellate Court.— (1) The parties to an appeal shall not be entitled to produce additional

evidence, whether oral or documentary, in the Appellate Court. But if

—

the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

74. APNRL withheld crucial details regarding its plant’s availability from CERC during the original proceedings. These details, which were solely in APNRL’s possession, only emerged during the Execution Petition stage. Given their significance, this Tribunal must consider them when determining APNRL’s entitlement to capacity charges for December 2018 to February 2019.

75. During this period, portions of APNRL's capacity were unavailable due to forced outages, making it ineligible to claim capacity charges under Article 8.5 of the PTC-PPA, which requires proof of third-party sales in case of non-supply to PTC. Since unavailable capacity could not have been supplied to third parties, APNRL's claim is unjustified. Therefore, the Impugned Order is liable to be set aside, and TANGEDCO cannot be directed to make any payments under it.

Analysis and Conclusion

76. After hearing the Learned Counsel for the Appellant and the Learned Counsel for the Respondents at length and carefully considering their respective submissions, we have also examined the written pleadings and relevant material on record. Upon due consideration of the arguments advanced and the documents placed before us, the following issue arises for determination in this Appeal:

Whether, in the case of a back-to-back contract, PTC can be held liable for payment without first receiving the corresponding amount from TANGEDCO.

77. In case the answer to the above question is affirmative, the appeal shall be required to be dismissed, as the sole question before the CERC was the same, the issues framed by the CERC were as follows:

Issue No. 1: *In terms of PTC-PPA and Procurer-PPA, whose obligation is it for payment towards supply of power by the Petitioner?*

Issue No. 2: *Whether payment obligation of PTC in terms of PTC-PPA is contingent upon the payment obligations of TANGEDCO under Procurer-PPA?*

Issue No. 3: Whether the Petitioner has rightly invoked Article 8.5 of the PTC-PPA? Whether the Petitioner is entitled to capacity charges along with penalties deducted/ withheld by the Respondent from the invoices for the months of December 2018, January 2019 and February 2019?

78. From the above, the main issue that emerges is whether PTC should pay the APNRL in the absence of receiving payment from TANGEDCO under the back-to-back PTC-PPA.

79. APNRL raised invoices for capacity charges for December 2018, January 2019, and February 2019. PTC withheld these payments, citing the non-receipt of payments from TANGEDCO.

80. APNRL claimed that under Article 8.5 of the PTC-PPA, it was entitled to capacity charges irrespective of whether it sold power to third parties due to PTC's default. CERC ruled in favor of APNRL, holding that PTC's obligation to pay was independent of TANGEDCO's payments.

81. Therefore, PTC has challenged this ruling before this Tribunal.

82. The Appellant's main argument is that the CERC after recognizing that the Procurer-PPA and PTC-PPA were back-to-back agreements, still held the Appellant liable to pay Respondent No.2.

83. Also contended that the Commission passed the order based on misinterpreting Article 8.5 of the PPA by imposing liability without determining whether Respondent No.2 sold power to a third party or if the capacity was

available during the relevant period, which is essential for adjudicating Respondent No.2's claim.

84. The relevant extract of the Impugned Order is extracted as under:

*“46. In the foregoing paragraphs, we have already held that the Petitioner is entitled to refund of the capacity charges including the penalty withheld/ deducted by the Respondents, the same being contrary to the provisions of the PTC-PPA and Procurer-PPA. **Therefore, PTC is liable to pay such amount including the late payment surcharge in terms of Article 8.4.3 of the PTC-PPA.** Further, PPAs being back-to-back in nature, PTC shall be entitled to the said amount from TANGEDCO in terms of Procurer-PPA and such payment shall be made by TANGEDCO to PTC with late payment surcharge in terms of provisions of the Procurer-PPA.*

85. The Appellant argued that the Procurer-PPA and PTC-PPA were back-to-back agreements, therefore, the CERC should have directed Respondent No.3 to pay the Appellant, who would then remit the payment to Respondent No.2.

86. Appellant contended that under the back-to-back agreement, the Appellant was only acting like a conduit/ intermediary in the whole transaction, placing reliance on the following cases decided by this Tribunal:

d) PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Others, Appeal No. 88 of 2010;

- e) **Lanco Power Ltd. v. Haryana Electricity Regulatory Commission and Other**, Appeal No. 51 ND 52 of 2011;
- f) **PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Others**, Appeal No. 168 of 2014;

87. Also submitted that the Delhi High Court in the case of **PTC India v. Jaiprakash Power Ventures Ltd.**, (2012) 130 DRJ 351, held as under:

“61. The APTEL's decision in Lanco III is instructive. The facts in brief were that Lanco was a generating company which entered into a PPA with Power Trading Corporation (PTC) for sale of 273 MW electricity from its Korba thermal power project in Chhattisgarh. The Haryana Power Generation Corporation Ltd. (HPGCL) approached the Haryana Electricity Regulatory Commission (HERC) for approval of purchase of power from Lanco's plant. An in-principle approval was granted by the HERC for purchase of power from Lanco's plant through PTC. A power Sale Agreement (PSA) was entered into between PTC and HPGCL for sale of the power purchased from Lanco. HPGCL approached the HERC for approval of the PSA. The HERC granted approval. Later PTC filed a petition before the HERC seeking a direction to HPGCL to purchase electricity at the tariff calculated in accordance with the CERC Regulations and the PSA to regulate the tariff. Among the objections raised by Lanco was that HERC lacked the jurisdiction to approve the tariff for purchase of electricity by PTC, an inter-state trading licensee, from Lanco which had its plant in Chhattisgarh. The decision of the HERC, negating the said objection, was challenged by Lanco before the APTEL. While upholding the said part of the order of the HERC, the APTEL observed:

So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company. ...”

88. Let us first examine the above-referred judgments, as under:

- In PTC India v. Jaiprakash Power Ventures Ltd. (2012) 130 DRJ 351, the issue was whether the CERC had exclusive jurisdiction over disputes or if the Arbitral Tribunal could adjudicate them.
- Similarly, in PTC India Ltd. v. Uttarakhand ERC & Ors. [2016 ELR (APTEL) 1176], the dispute revolved around determining which State Commission had jurisdiction over the parties' claims.
- Lanco Power Ltd. v. HERC & Ors. [2011 ELR (APTEL) 1714], the issue was determining which State Commission had jurisdiction over disputes under the PPA/PSA, based on the nature of the transaction.
- Lanco Budhil Hydro Power Pvt. Ltd. v. HERC & Ors. (Appeal No. 188 of 2011, Judgment dated 09.08.2012), the dispute was about whether the State Commission had jurisdiction over a termination notice issued by one party. This has no bearing on the current matter, which

deals with the interpretation of specific PPA provisions regarding payment security.

89. None of the above cases has touched upon the issue pertaining to the instant case, as such we decline to accept the contention of the Appellant except that it is acting as a trader under the provisions of the Electricity Act, 2003.

90. Further, argued that the understanding between the parties, as evidenced by Respondent No.2's email dated 29.06.2021, wherein it expressly stated that PTC should release APNRL's claim of ₹33.65 crore with late payment surcharge only after receiving the corresponding payment from TANGEDCO. This confirms that Respondent No.3 is ultimately liable for the payment.

91. Undisputedly, TANGEDCO is liable to pay the energy charges to PTC under the Procurer-PPA, as also ruled by the Commission under para 46 of the Impugned Order, however, PTC cannot shirk its liability from complying with the provisions of the PTC-PPA inter-alia making payment to APNRL.

92. After examining the Impugned Order, it is just and proper that the CERC has rightly interpreted the relevant provisions of the PPA/PSA before arriving at the final conclusion after recording and considering the submissions made by PTC, the relevant paragraphs no. 27, 29, 30, 31, 33, and 34 of the Impugned Order are important to note:

“27. In terms of Articles 6 and 8 of the PTC-PPA, PTC is required to pay to the Petitioner as per the tariff agreed under Procurer-PPA minus its trading margin. Also, PTC is required to pay towards the supply of

power to the Petitioner by the Due Date, as defined under the Procurer-PPA, plus one day. In terms of Article 8.4, PTC is required to provide adequate payment security to the Petitioner, inter-alia, by providing Stand by Letter of Credit/ Bank Guarantee. In terms of Article 8.4.11.1, PTC is required to provide Stand by Letter of Credit to the Petitioner 25 days before the Scheduled Delivery Date under Procurer-PPA and to be renewed annually for an amount as specified in Article 8.4.11.2. PTC is also required to restore and renew the Stand by Letter of Credit, from time to time as per Articles 8.4.11.3 and 8.4.11.5.

.....

29. The above Articles in Procurer-PPA are mostly on the lines of PTC-PPA with minor changes in the time frame such as 'Due Date', furnishing/ reinstating of LC, etc. indicating their back-to-back nature and inter-connectedness thereby implying that TANGEDCO is liable to pay to PTC and that PTC is liable to pay to the Petitioner. However, payment to the Petitioner by PTC including furnishing LC in favour of the Petitioner is not conditional upon the payment to be made and furnishing of LC by TANGEDCO to PTC.

30. PTC has contended that since PPAs are back-to-back in nature, the financial obligations of PTC qua payment against supply of power and furnishing of LC under PTC-PPA is subject to the payment and furnishing of LC by TANGEDCO under Procurer-PPA. PTC has further contended that it is not functioning as a Merchant Trader in the instant case and its role is that of an intermediary between the Petitioner and TANGEDCO without taking upon itself the financial and commercial

risks. In support of its contentions, PTC has relied upon various judgments of APTEL and Hon'ble High Court of Delhi.

31. It is not in dispute that the terms of PPAs i.e. PTC-PPA as well as Procurer PPA make it clear that supply to TANGEDCO is from an identified source i.e. the Petitioner's generating station and that end consumer/ ultimate beneficiary of the Petitioner's generating station to the extent of 100 MW is TANGEDCO. Also, as noted above, both the PPAs are back-to-back in nature and are inextricably linked. However, having said that, in our view in terms of provisions of Articles 6 and 8 of the PTC-PPA, it does not follow that the payment obligation of PTC to the Petitioner is conditional upon corresponding obligation of TANGEDCO. The commercial and financial risk undertaken by trader has to be ascertained from the express provisions of the PPAs, which in present case clearly establish that they are not conditional as claimed by PTC. We also note that in PTC-PPA, PTC has suitably modified timeframe for various financial obligations qua the Petitioner such as 'Due Date' for payment of invoices, for furnishing/ reinstating of LC, etc., which appears to be solely for the purpose of safeguarding/ limiting its commercial and financial risks.

.....

33. PTC has argued that it cannot make payment indefinitely from its own resources. The rights/ remedies available to the Petitioner under PTC-PPA are on back-to-back basis of rights/ remedies available to PTC under Procurer-PPA. Perusal of the provisions of Procurer-PPA clearly indicates that PTC has appropriate remedy available in case TANGEDCO fails to provide LC or make timely payments of dues for

the energy supplied. Needless to say, both PTC and TANGEDCO have failed in making payment to the Petitioner against bills raised and providing LC in terms of the PTC-PPA/ Procurer-PPA and the same has led to filing of this Petition.

34. Thus, in our view, in terms of the provisions of the PTC-PPA, the Respondent PTC is liable to make payment to the Petitioner for electricity supplied to TANGEDCO and also provide LC to the Petitioner in terms of the PTC-PPA.”

93. We are satisfied that after detailed deliberation/examination, the Central Commission has correctly interpreted the provisions under the two PPAs and the obligations of signatories therein.

94. If we agree with the Appellant's contention, then there was no requirement to sign two different PPAs, one PPA would have suffice the contract incorporating the trading margin for the Appellant.

95. On being asked, the Appellant could not place any satisfactory answer to point out any infirmity in the aforesaid findings of the CERC.

96. Additionally, the Appellant failed to show any provision in the PPA absolving PTC from undertaking any risk whatsoever, as contended by PTC.

97. We agree with APNRL's submissions that PTC acting as an electricity trader has a crucial risk-mitigation role, as recognized in the CERC Trading Licence Regulations, 2020 and its Statement of Reasons. Despite charging a trading

margin, PTC did not fulfill its obligations, including opening a Letter of Credit (“LC”) facility in favor of APNRL and ensuring timely payments for electricity supplied under the PTC-PPA.

98. The relevant extracts of the SoR and the Trading Licence Regulations, 2020 are extracted as under:

a) SoR

“Analysis and Decision

6.2.3. The Commission is of the view that traders are expected to play an important role of risk mitigation in the Indian power market. However, several contracts have been brought to the notice of the Commission where traders have not discharged their duties with respect to provision of adequate payment security mechanism. There are instances of contract dishonour, where buyer Discoms have reneged on their contractual obligations and Power Sale Agreements (PSAs) have not been operationalized by trading licensees, leaving sellers in a quandary. The traders have not stepped into the shoes of the seller and have not off-taken power from such sellers who were constrained to sell on the spot market at a loss. In select instances, the default risk and late payment risk have also not been subsumed by the traders. The payment is made by trader to seller only upon receipt of funds from the buyer Discoms. Further, there have also been contracts in day ahead market where traders have defaulted on the payments to be made to sellers.

6.2.4. Hence the Commission is of the view that the traders should provide an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller.”

b) Trading Licence Regulations, 2020

“TERMS AND CONDITIONS OF THE LICENCE

9. Obligations of the Trading Licensee

The Trading Licensee shall be subject to the following obligations, namely:-

(10) The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:

- (a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;**
- (b) one point zero five (1.05) times of contract value for short term contracts.”**

99. From the above, it is clear that the CERC has while specifying the conditions for a trading licence considered the following:

- traders shall play an important role in risk mitigation in the Indian power market.
- several contracts have been brought to the notice where traders have not discharged their duties with respect to the provision of adequate payment security mechanisms.
- in select instances, the default risk and late payment risk have also not been subsumed by the traders.
- the payment is made by the trader to seller only upon receipt of funds from the buyer Discoms

100. Accordingly, the CERC ensured that the above is not repeated in the future by incorporating a provision that the traders should provide an escrow arrangement or irrevocable, unconditional, and revolving letter of credit in favor of the seller.

101. The Regulation thus provided that the Trading Licensee shall make payment of dues by the agreed due date to the seller for the purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional, and revolving letter of credit in favor of the seller.

102. However, no condition of such payment is incorporated that the payment will be made only after receipt of payment from the procurer.

103. The Appellant also argued that Respondent No.2 had previously approached the CERC seeking relief directly from TANGEDCO, as noted in Paras 18, 19, 20, and 21 of the order.

104. This contention was countered by APNRL stating that PTC has relied on the CERC order dated 19.08.2019 arguing that APNRL had previously sought compensation for the change in law events only from TANGEDCO, therefore, PTC contends that the present claim should also be directed solely against TANGEDCO and not PTC.

105. Further, argued that this argument is factually incorrect. A review of prayer (b) in the said petition shows that APNRL had sought payments from both PTC and TANGEDCO. Moreover, in Petition No. 17/MP/2019, TANGEDCO did not dispute its liability on the ground that it was not a party to the PTC-PPA.

106. We, thus, disagree with the submission of the PTC.

107. The Appellant also argued that the CERC while determining the liability of Respondent No.3 and the Appellant, under the provisions of Clause 8.5 of the Procurer-PPA, failed to examine whether Respondent No.2 had sold power to third parties and received payments, which should have been offset against its claim.

108. On examination of the Impugned Order, we agree with the submissions of the APNRL that this argument is beyond the scope of PTC's original pleadings before CERC and is legally unsustainable.

109. From the documents placed before us, it is seen that PTC in its reply before CERC, has not disputed APNRL's entitlement to payments. Since PTC did not raise this contention in the original proceedings, it is precluded from introducing it in the present appeal, the relevant PTC's submissions before CERC are noted as under:

“5. At the outset, it is submitted that TANGEDCO has not denied non-payment dues. As such its liability to pay stands crystalised. TANGEDCO is taking hyper technical pleas to avoid its liability.”

110. Further, TANGEDCO also taken a stand before the CERC as recorded in the impugned order under:

*“8. The matter was heard on 21.5.2020. During the course of hearing, the learned counsel for the TANGEDCO submitted as under:
(a) TANGEDCO is not disputing the claims of the Petitioner.”*

111. Further, the CERC in Para 25 of the Impugned Order has noted as under:

“25. On the other hand, PTC has argued that TANGEDCO has not denied nonpayment of the Petitioner’s dues. As such, its liability to pay stands crystalized and TANGEDCO is raising hyper-technical pleas to avoid its liability.....”

112. The CERC, in Para 40 to 43 recorded that:

“40. The Petitioner vide its letter dated 11.12.2018 informed PTC regarding delay in payment of the monthly invoices by the due date as well as failure to provide LC in favour of the Petitioner. The Petitioner in the said letter also indicated that the Petitioner would be constrained to invoke provisions of Article 8.5.2 read with Article 8.5.8 of the PTC-PPA in case LC is not provided to the Petitioner and

outstanding dues are not paid along with late payment surcharge. The Petitioner also informed PTC to consider the said letter as notice under Article 8.5.2 to enable PTC to take needful action. In response, PTC vide its letter dated 17.12.2018 contested the invocation under said Articles by the Petitioner only on the ground that the PPAs entered into between the parties are back-to-back in nature. It also forwarded the said letter of the Petitioner dated 11.12.2018 to TANGEDCO vide its letter dated 12.12.2018. Thus, requirement of notice in terms of provisions of the PPAs has been satisfied. Subsequently, the Petitioner vide its letter dated 18.12.2018, once again citing the outstanding dues and non-opening of LC, intimated to PTC that it would invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA and requested PTC to arrange for sale of total contracted capacity to third parties w.e.f. 20.12.2018.”

.....

42. It is not in dispute that there has been delay on part of the Respondents to make timely payment towards the invoices raised by the Petitioner. TANGEDCO in its letter dated 4.1.2019 has clearly admitted that since it is facing severe financial crisis, payment towards energy bills under long-term PPAs are outstanding. TANGEDCO further informed that steps are being taken by it to mobilize funds through various sources and sequential payment will be maintained as and when financial position would improve. PTC in its various letters as well as submissions has taken a stand that since the PPAs are of back-to-back nature, the liability of PTC to make payment as well as furnishing of LC is subject to receipt of the same from TANGEDCO under Procurer-PPA.”

43. It is also not in dispute that neither payment security mechanism in the form of LC was provided to the Petitioner in terms of Article 8.4.11 of the PTC-PPA to cater to the invoices raised by the Petitioner, nor the invoices raised by the Petitioner were being paid by the due date in terms of the PPAs. Accordingly, in our view, the Petitioner was entitled to invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA which provides for third party sale of default electricity and consequently to receive the capacity charges towards such default electricity in terms of Article 8.5.8 of the PTC-PPA.

113. We are satisfied that PTC's attempt to dispute liability at this stage is legally impermissible, it had already admitted liability before CERC and TANGEDCO.

114. On being asked, the APNRL submitted that it has, through its letter dated 23.11.2020, requested payment of outstanding dues while duly adjusting ₹1,01,14,173 as surplus revenue through sale to third parties under Article 8.5.7 of the PTC-PPA. This adjustment was made against the claimed capacity charges of ₹36,62,81,844 for December 2018, January 2019, and February 2019, as reflected in the REA Bills submitted before CERC.

115. It is important to note the submissions of TANGEDCO before us.

116. TANGEDCO submitted that the CERC in the Impugned Order directed PTC to pay APNRL the claimed amounts, recognizing the back-to-back nature of the PTC-PPA with APNRL and the TANGEDCO-PPA, *inter-alia*, permitting PTC to recover the paid amounts from TANGEDCO.

117. However, PTC has not issued any invoices to TANGEDCO for the relevant amounts, in fact, in an affidavit dated 16.05.2023 filed before CERC in the execution proceedings, PTC highlighted discrepancies between the invoices raised by APNRL on PTC and those raised by PTC on TANGEDCO, and claiming that it did not raise invoices based on a bona fide belief that the CERC order was under challenge before this Tribunal.

118. The conduct of the Appellant is unwarranted and deserves strong condemnation.

119. TANGEDCO further pleaded that the PTC-PPA and TANGEDCO-PPA are back-to-back agreements, they contain distinct billing provisions. Under the PTC-PPA, APNRL must submit monthly bills to PTC within nine days of the following month, while PTC, under the TANGEDCO-PPA, must invoice TANGEDCO within ten days. Therefore, TANGEDCO is only liable for invoices raised by PTC, not those raised by APNRL. The independent existence of these agreements must be upheld, even if they are considered back-to-back.

120. We agree with the submissions of the TANGEDCO that the independent existence of these agreements must be upheld, even if they are considered back-to-back.

121. We are satisfied that there is an utter failure on the part of the Appellant in honoring the agreements signed by it after noting the submissions of the TANGEDCO that it has consistently maintained that it cannot release payment to PTC without receiving a corresponding invoice, even this position is evident from

APNRL's letter to PTC dated 15.06.2021, wherein APNRL referred to discussions with TANGEDCO regarding the release of the amount covered under the impugned order. In the said letter, TANGEDCO reiterated that payment could only be made if PTC raised an invoice.

122. The Appellant also filed an IA no. 1818 of 2024 seeking permission to place additional documents.

123. The Appellant has not placed any argument in support of reasons for filing the additional document, however, TANGEDCO invited our attention to Order XLI Rule 27 of the Code of Civil Procedure, 1908, stating that this Tribunal as the Appellate forum can take on record the additional details.

124. TANGEDCO claimed that these are crucial details regarding the APNRL plant's availability. Given their significance, this Tribunal must consider them when determining APNRL's entitlement to capacity charges for December 2018 to February 2019.

125. We find no merit in the contention of the Appellant and TANGEDCO. The issue before this Tribunal is not to adjudicate the quantum of entitlement of capacity charges. The only issue before this Tribunal is whether PTC is bound to pay the APNRL under the PTC-PPA, even if no payment is made by TANGEDCO to PTC under the Procurer-PPA.

126. On being asked, it was confirmed that these documents pertain to another petition filed in the CERC regarding non-compliance with the Impugned Order.

127. It is a settled principle of law that any additional evidence that was not placed before the original court shall not be allowed except in exceptional circumstances.

128. The Order XLI Rule 27 is quoted as under:

“27.(Production of additional evidence in Appellate Court)—(1)

The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

129. The issue has already been settled in the foregoing paragraphs and decided against the Appellant.

130. The Hon'ble Supreme Court of India in **Karnataka Board of Wakf v. Govt. of India, (2004) 10 SCC 779: 2004 SCC OnLine SC 505** has held as under:

“The scope of Order 41 Rule 27 CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment. In this view of the matter, we do not think there is any justification for us to interfere with the orders of the High Court.”

131. We do not find any reason to allow the IA and take the additional documents on record, accordingly, the IA is dismissed as devoid of merit.

132. In the light of the above, it is concluded that:

- a) PTC is liable to make payments to APNRL, irrespective of whether it receives payments from TANGEDCO.
- b) The back-to-back nature of the agreements does not negate PTC's independent financial obligations under the PPA.

133. Therefore, we do not find any infirmity in the Impugned Order, and is upheld.

ORDER

For the foregoing reasons as stated above, we are of the considered view that Appeal No. 168 of 2020 does not have any merit and is dismissed.
Any IA pending is also disposed of accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 8th DAY OF MAY, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / ~~NON-REPORTABLE~~

pr/mkj/kk