

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

**Appeal No. 203 of 2022,  
Appeal No. 242 of 2022  
&  
Appeal No. 248 of 2022**

**Dated: 8<sup>th</sup> April, 2024**

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

**Appeal No. 203 of 2022**

**In the matter of:**

M/s. Arinsun Clean Energy Private Limited  
Office – 0001, Level G, Pentagon P-5,  
Magarpatta City, Hadaspur,  
Pune – 411013.

... (Appellant)

**VERSUS**

1. Central Electricity Regulatory Commission  
Through: The Secretary  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building  
Janpath, New Delhi – 110 001.
2. Madhya Pradesh Power Management Company Limited  
Through: Managing Director  
Registered Office, Shakti Bhawan, Rampur  
Jabalpur – 482008.
3. M/S Rewa Ultra Mega Solar (Rums) Limited  
Through: Chairperson  
Urja Bhawan Shivaji Nagar, Link Road No. 2,  
Bhopal-462016, Madhya Pradesh.

4. M/S Western Region Load Dispatch Centre,  
Through Executive Director  
F-3, MIDC Area, Marol, Andheri (East),  
Mumbai – 400093.
5. M/s. Athena Jaipur Solar Power Private Limited  
Through Director  
Plot No. 152, Sector 44,  
Gurgaon, Haryana -122002.
6. M/s. Mahindra Renewables Private Limited  
Through Director  
Mahindra Towers, Dr. G. M. Bhonsle Marg,  
P. K. Kurne Chowk, Worli,  
Mumbai – 400018.

...Respondent(s)

**Appeal No. 242 of 2022**

**In the matter of:**

M/s. Mahindra Renewables Private Limited  
Through Director  
Mahindra Towers, Dr. G. M. Bhonsle Marg,  
P. K. Kurne Chowk, Worli,  
Mumbai – 400018.

... (Appellant)

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Urja Bhawan Shivaji Nagar, Link Road No. 2,  
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Through Executive Director  
F-3, MIDC Area, Marol, Andheri (East),  
Mumbai – 400093.
5. M/s. Arinsun Clean Energy Private Limited  
Through Director  
Office – 001, Level G, Pentagon P-5,  
Magarpatta City, Hadaspur,  
Pune – 411013.
6. M/s. Athena Jaipur Solar Power Private Limited  
Through Director  
Plot No. 152, Sector 44,  
Gurgaon, Haryana -122002.

...Respondent(s)

**Appeal No. 248 of 2022**

**In the matter of:**

M/s. Athena Jaipur Solar Power Private Limited  
Through Director  
Plot No. 152, Sector 44,  
Gurgaon, Haryana -122002.

... (Appellant)

VERSUS

1. Central Electricity Regulatory Commission  
Through: The Secretary  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building  
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3. M/S Rewa Ultra Mega Solar (RUMS) Limited  
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Through Executive Director  
F-3, MIDC Area, Marol, Andheri (East),  
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5. M/s. Arinsun Clean Energy Private Limited  
Through Director  
Office – 001, Level G, Pentagon P-5,  
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Through Director,  
Mahindra Towers, Dr. G.M. Bhonsle Marg,  
P.K. Kurne Chowk, Worli,  
Mumbai – 400018.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Basava P. Patil, Sr. Adv.  
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Mr. Nitish Gupta  
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Ms. Shefali Tripathi  
Mr. Nishant Talwar  
Ms. Nehul Sharma  
Mr. Utkarsh Singh  
Ms. Parichita Chowdhury  
Mr. Neel Kandan Rahate  
Ms. Raksha Agarwal  
Ms. Surabhi Pandey

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Mr. Aditya Jain  
Ms. Nipun Sharma  
Mr. Allan Massey  
Mr. Ankit Kumar

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Ms. Pavitra Balakrishna  
Mr. Subin Kumar for R-2

Ms. Abiha Zaidi for R-4

### **JUDGEMENT**

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

1. The captioned Appeals Nos. 203 of 2022, 242 of 2022 and 248 of 2022 have been filed by M/s. Arinsun Clean Energy Private Limited, M/s. Mahindra Renewables Private Limited and M/s. Athena Jaipur Solar Power Private Limited respectively challenging the Order dated 25.04.2022 (hereinafter referred as "Impugned Order") passed by the Central Electricity Regulatory Commission in Petition No. 345/MP/2018 filed by Madhya Pradesh Power Management Company Ltd. (in short "MPPMCL").

2. The Appellants being M/s Arinsun Clean Energy Private Limited (in short "ACEPL"), M/s. Mahindra Renewables Private Limited (in short "MRPL") and M/s. Athena Jaipur Solar Power Private Limited (in short "AJSPPL") are the Solar Power Developers (in short "SPDs") *inter-alia* has set up Solar Power Project (in short "SPP") in the State of Madhya Pradesh (in short "MP").

3. The CERC being the Respondent No. 1, in all the three captioned appeals, is the appropriate authority *inter-alia* having been vested with the powers under the Electricity Act, 2003 (in short “Act”) to adjudicate the matter in dispute.

4. The MPPMCL being the Respondent No. 2, in all the three captioned appeals, is a government company under the control of the Government of MP and is the nominee of the Government of Madhya Pradesh entrusted with the function of purchase of bulk power on behalf of the distribution companies of the State of Madhya Pradesh.

5. M/S Rewa Ultra Mega Solar (RUMS) Limited being the Respondent No. 3, in all the three captioned appeals, is a Joint Venture Company of Madhya Pradesh Urja Vikas Nigam Limited and Solar Energy Corporation of India and has developed the Rewa Solar Park.

6. WRLDC being the Respondent No. 4, in all the three captioned appeals, is the System Operator responsible for ensuring integrated operation of the power system in the Western Region under the provisions of the Act.

7. Respondent No. 6 & 7, in all the three captioned appeals, are the other two SPDs who have filed the other two captioned appeals.

**Factual Matrix**

8. The three captioned appeals are identical on facts and assailing the common order i.e. the Impugned Order dated 25.04.2022 on the same issue, therefore, the three appeals are tagged for the purpose of adjudication and the factual matrix of Appeal No. 203 of 2022 is noted in brief and considered for this purpose.

9. The Government of Madhya Pradesh initiated the project of 750 MW as a part of solar park scheme of Govt. of India in Rewa District in the State of Madhya Pradesh namely the Rewa Ultra Mega Solar Project (hereinafter referred to as “Rewa Solar Project”) with a view to promote the development of renewable energy projects.

10. The Central Commission vide its Order dated 24.11.2015, under Regulation 3 of the CERC (Grant of Regulatory Approval for execution of Inter-State Transmission Scheme to Central Transmission Utility) Regulations, 2010, has granted its approval to Power Grid Corporation of India Limited (in short “PGCIL”) for developing the power transmission infrastructure for the Rewa Solar Project as ISTS lines, pursuant to the same, RUMS had availed connectivity and Long-Term Open Access (in short “LTOA”) from the Central Transmission Utility for 750 MW at Rewa Pooling station of PGCIL.

11. Thereafter, RUMS issued the Request for Proposal dated 16.03.2016 (in short “RFP”) and invited bids from power project developer(s) to develop, operate and maintain grid-connected solar photovoltaic power plants with an aggregate capacity of 750MW (3 x 250MW), to be set up as a part of the Rewa Solar Project.

12. The Appellant, including certain other similarly placed developers, participated in the bid and RUMS accepted the Appellant's bid to develop 250 MW Capacity of the Rewa Solar Project, and on 21.02.2017, a Letter of Intent (in short "LoI") was issued in favour of the Appellant to establish a 250 MW Solar PV Project, *inter-alia*, as per the LoI, the Project was required to be connected at an identified ISTS Substation.

13. Consequently, the Appellant executed a PPA for solar energy generated from the Project with RUMS and MPPMCL dated 17.04.2017 and on the same date i.e., 17.04.2017 the Appellant, RUMS and Delhi Metro Rail Corporation (in short "DMRC") executed another PPA, whereby, under Article 7.2 of the PPA signed with MPPMCL, WRLDC has been identified as the nodal agency for system operation, power accounting, scheduling etc., further this Article stipulated that the power accounting shall be done as per the Grid Code specified by the Central Commission and in accordance with the CERC (Deviation Settlement Mechanism and related matters) Regulations, 2014 (hereinafter referred to as "DSM Regulations, 2014"), and Article 7.3, RUMS is required to avail connectivity for evacuation of power for Rewa Solar Project at REWA pooling substation which is part of the CTU network.

14. The SPP of the Appellant achieved commercial operation on 03.01.2020 for its entire capacity of 250 MW and the Project has a connectivity by separate 220 kV lines from its pooling stations at 220 kV side of the 400/220 KV PGCIL Substation Rewa (Delivery Point of Generation) of CTU network, accordingly, the jurisdiction rests with WRLDC.



15. Notably, any SPP generates electricity only when the sunlight is available and if sunlight is not available, even though the generating station remains operational, however, cannot generate power during such period i.e., non-generation hours and the Plant draws power from the ISTS Grid for auxiliary consumption of the SPP, as also draws power during shutdown and maintenance.

16. On 18.07.2018, MPPMCL vide its letter dated 18.07.2018 addressed to RUMS, with a copy marked to WRLDC, proposed to bill the active energy drawn from the ISTS Grid by the Appellant at the rate applicable to temporary connection under HT Industrial category in accordance with Clause 10 of 7<sup>th</sup> Amendment to the MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy), (Revision – I), Regulations, 2010 (hereinafter referred to as "MPERC RE Regulations, 2010"), the Clause 10 is quoted as under:

*“10. Drawing power by Generator/ Co-generation from Renewable energy sources*

*The Generator/ Co-generation from Renewable Sources would be entitled to draw power exclusively for its own use from the Transmission/Distribution Licensees’ network for **synchronization of plant with the grid or during shutdown period of its plant or during such other emergencies. The power availed during synchronization of plant with the grid shall be billed for the period and at the rate as per retail supply tariff order under tariff schedule for synchronization. In other cases, it would be billed at the rate applicable to temporary connection under HT Industrial category**”*

**[Emphasis Supplied]**

17. Subsequently, the above said MPERC RE Regulations, 2010 has been superseded by a subsequent legislation i.e., MPERC (Cogeneration and Generation of Electricity from Renewable Sources of Energy), (Revision – II), Regulations, 2010 (hereinafter referred to as “MPERC RE Regulations 2021”), which came into force on 02.11.2021 i.e., prior to the orders being reserved by the Central Commission in the impugned proceedings (i.e., 13.01.2022), under the said MPERC RE Regulations 2021, the relevant extract of the said Regulation is quoted as under:

*“8. Drawing power by Generator/Co-generator from Renewable Source of Energy*

*The Generator/Co-Generator from Renewable Sources of Energy **connected with the transmission or distribution system** would be entitled to draw power exclusively for its own use from the Distribution Licensee for **synchronisation of plant with the grid or during shutdown period of its Plant or for Auxiliaries or Start-up Power or for planned or forced outage or during other emergencies (but not for construction)** and shall be billed for the period at the rate as per the Retail Supply Tariff Order.”*

**[Emphasis Supplied]**

18. Thereafter, on 06.08.2018, in response to the letter dated 18.07.2018 written by MPPMCL, WRLDC responded that Rewa Solar Project is situated in the control area of WRLDC, and power drawn by Appellant is being accounted and billed as

per 2<sup>nd</sup> amendment of CERC (Deviation Settlement Mechanism and related matters) Regulations, 2014 (hereinafter referred as “DSM Regulation 2014”), as such, there cannot be any additional charges imposed on Appellant in so far as the drawl of the power during non-generation hours is concerned, the relevant extracts of the reply of WRLDC is quoted as under:

*“1. REWA Ultra Mega Solar Ltd (RUMSL) is an ISTS connected Solar Generating station with the control area jurisdiction of WRLDC, in line with (Indian Electricity Grid Code) (Third Amendment) Regulations, 2015, clause 6.4 (2)(b) of Part 6 of Principal Regulations which states that "Ultra Mega Power Projects including projects based on wind and solar resources and having capacity of 500 MW and above" shall come under the respective regional ISTS control area and hence the respective RLDC shall coordinate the scheduling. The above was also recorded in the first meeting held on 28th Feb. 2018 at WRLDC to discuss the integration of first ISTS Ultra Mega Solar Ltd.*

*2. As per approved Detailed Procedure made under Regulation 27 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 for grant of connectivity to projects based on renewable energy sources to inter-state transmission system (ISTS) dt 15 May, 2018 and the existing clause 1.3.1 of Hon'ble CERC's approved procedure dated 31.12.2009 on (Grant of Connectivity, Long-Term Access and Medium-Term Open Access in inter state transmission and related*

matters) Regulation 2009, **RUMSL had availed connectivity with CTU system for 750 MW at REWA Pooling station of PGCIL.**

.....

5. After COD of the stations as per, Clause Annexure-/ of IEGC2010, any deviation from actual generation/ actual drawl from the scheduled generation/ scheduled drawl shall be treated as Unscheduled Inter Change. All three SPDs of RUMs are DSM Pool member of WR and any deviation from schedule has been accounted and billed as per 2nd Amendment of DSM Regulation, 2015, dt. 7<sup>th</sup> August 2015.

6. **As any drawl from the ISTS grid by any of the three SPDs are already been taken care, accounted and billed and all three SPDs are in the control jurisdiction of WRLDC, it is felt, they will be governed by the Regulations by Hon'ble CERC as detailed above and no additional charges would be applicable to these SPDs as far as drawl of power is concerned.**

[Emphasis Supplied]

19. The Appellant in the present Appeal has prayed the following:

“a. Issue appropriate order(s) / direction(s) to set aside the findings and observations made by the Ld. Central Electricity Regulatory Commission in the Impugned Order dated 25.04.2022 in Petition No. 345/MP/2018, whereby the Appellant has been directed to

*immediately and not later than one month from the date of the Impugned Order, enter into power purchase arrangement for drawl of power either with the distribution licensee of the State in which they are located or with any other entity through open access, for being neither plausible nor in conformity of the extant regulatory framework;*

- b. Issue appropriate direction(s)/order(s) to Respondent – Western Load Despatch Centre to allow the Appellant to drawl power during Non-Generation Hours and during shutdown periods and to bill the Appellant in accordance with applicable law;*
- c. Pass such further and other order or Orders as this Hon’ble Tribunal may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”*

20. Further, the Appellant, assailing the directions passed by the Central Commission vide the Impugned Order, has submitted that the such directions are contrary to law and are impossible to be complied with due to the following key reasons:

- a. The directions passed by the Central Commission are beyond the prayer / pleadings filed by MPPMCL in Petition No. 345/MP/2018.
- b. Under the CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022. (in short “GNA

- Regulations”), the eligibility criteria for any bulk consumer to obtain GNA / open access is that it shall procure minimum 50 MW capacity from grid, however, in the present case, the total quantum of power procured by all the generators cumulatively during night hours / non-generation hours is less than 3 MW, therefore, under the current regulatory framework, it is impossible for the Appellant to procure / purchase power during night hours / non-generation hours through open access / GNA.
- c. As far as procuring power from the Distribution Licensee of the area of supply is concerned, the Appellant’s SPP is directly connected to the CTU’s network and has no physical connection with the State Grid / the network of distribution licensee, therefore, it is impossible for the Appellant to procure / purchase power during night hours / non-generation hours, from the Distribution Licensee.
- d. Without prejudice to the aforesaid, the law is well settled by this Tribunal in catena of judgments that the generator cannot be a consumer of a distribution licensee and the power procured by it for auxiliary / start-up purposes cannot be treated as power being supplied by a distribution licensee to its consumer, therefore, since the Appellant cannot be a consumer of a distribution licensee and is also not directly connected to any State network, any directions passed by the Central Commission in the Impugned Order requiring Appellant to enter in power purchase agreement with the distribution licensee for the purposes to purchase of power during night hours / non-generation hours is contrary to law and is impossible to be complied with.

- e. The Central Commission while passing the Impugned Order has failed to take into account that under CERC DSM Regulations, in the event of actual generation being less than the scheduled generation, the deviation charges for shortfall in generation shall be payable by such solar generator to the Regional DSM Pool and in the event of the actual generation being more than the scheduled generation, the Deviation Charges for excess generation shall be payable to the wind or solar generators from the Regional DSM Pool, further, the Central Commission ignored the fact that ISTS connected conventional power plants rely on DSM mechanism for drawl of the power during its Non-Generation Hours, such power drawn is considered by RLDCs as 'Unscheduled Interchange' and accordingly dealt under the CERC DSM Regulations.
- f. It is noteworthy that throughout India, all the solar generators procure power from the grid during non-generation night hours and power procured during such non-generation hours / night hours is accounted by concerned RLDC under the DSM, such details of other RLDCs have been filed before this Tribunal along with Memo dated 13.02.2023, the Central Commission by directing the Appellant to immediately enter into power purchase arrangement for drawl of power either with the distribution licensee of the State in which they are located or with any other entity through open access, has committed grave error since compliance of such directions is neither plausible nor in conformity with the extant regulatory framework, whereas, WRLDC treating / accounting night time / non-generation hours drawls under the DSM Regulations is as per the

standard practice being adopted throughout India and is no way contrary to any law or regulations framed by the Central Commission.

21. The Appellant also submitted that, by virtue of the said MPERC RE Regulations 2021, only those renewable generators which are connected to the state transmission or distribution system are entitled to draw power exclusively for its own use from the Distribution Licensee and such qualification i.e., 'only those generators that are connected with the state transmission or distribution system' is rightly added by the MPERC, since being the State Regulatory Commission, could not have exercised its jurisdiction over those renewable generators who are connected to the ISTS Grid being part of the CTU network, therefore, the MPERC RE Regulations 2010 or MPERC Regulations, 2021 cannot be made applicable to those renewable generators, who are connected at ISTS Grid / CTU network and since the Appellant in the present case is connected directly to CTU's network, hence, due to regulatory and practical restrictions, it is impossible for the Appellant to enter into a power purchase agreement with the DISCOMs operating in its area of supply for drawl of power during non-generation hours.

22. The Appellant reiterated that the solar power generators, connected at ISTS Grid level i.e., with CTU's network, as a matter of industry practice, used to draw power from the ISTS grid during non-generation night hours and/ or shutdown and / or maintenance and the same was being treated as deviation under the DSM Regulations, such a practice is industry wide being followed in all the regions, therefore, it is contrary to law to direct only the Appellant (and few other generators operating in Western Region) to enter into power purchase agreement with the Distribution Licensee or any other open access supplier for the purposes of drawl



of power during night hours / non-generation hours and to allow the solar generators in other regions to draw such power and account it under the DSM Regulations.

23. The Appellant invited our attention to the fact that the impugned order deviates from the existing regulatory framework as the Central Commission has erred in treating power drawn for non-generation hours as 'infirm power', *inter-alia* submitted that under the regulatory scheme, 'infirm power' relates to electricity injected into the grid prior to the commissioning of a unit of the generating station which is not the case herein, therefore, the power consumed by the Appellant for its auxiliary purposes during night hours / non-generation hours cannot be treated as infirm power consumed by the Appellant.

24. Also informed that WRLDC during the proceedings before the Central Commission had submitted that drawl of power for non-generation hours had been treated as Unscheduled Interchange as per DSM Regulations 2014 and the same mechanism is relied on in case of conventional power plants drawing power during non-generation hours, however, the Central Commission ignored the submissions made by WRLDC along with its response to MPPMCL's letter dated 18.07.2018 and held that extant regulatory framework does not have any provision for treating such power, further, argued that the Central Commission in the Impugned Order did not deal with the submissions made by the Appellant explaining the mechanism by way of which the drawl of power during non-generation night hours and during shutdown periods by the solar / wind power generators is treated under DSM Regulations 2014.

25. The Appellant claimed that throughout the country all the solar generators procure power from the grid during non-generation hours and power procured during night hour is account by RLDC under the DSM, referred to the Memo dated 13.02.2023 filed before this Tribunal, wherein, the Appellant has submitted block wise deviation settlement account of all the solar power developers operating in the Northern Region, Southern Region, Western Region and Eastern Region and in order to explain the treatment of night hour generation by other RLDC, the Appellant referred to the following illustrations:

- a) **Northern Regions:** During the morning hours (time 00:00 to 17:15) when there is no sunlight, the generation is being accounted in negative because of drawl of power from grid and accordingly deviation charges are levied at PPA rate. It is only during the day (time 07:30 to 17:30) that the deviation is positive due to injection of power into the grid. Thereafter, during night hours (time 17:45 to 23:45) generation is again in negative due to drawl of power during night hours and DSM charges are imposed at PPA rates.
  
- b) **Eastern Regions:** During the morning hours (time 00:15 to 10:15) when there is no sunlight, the generation is being accounted in negative because of drawl of power from grid and accordingly deviation charges are levied at PPA rate. It is only during the day (time 10:30 to 17:30) that the deviation is positive due to injection of power into the grid. Thereafter, during night hours (time 17:45

to 24:00) generation is again in negative due to drawl of power during night hours and DSM charges are imposed at PPA rates.

c) Southern Regions: During the morning hours (time 00:15 to 06:30) when there is no sunlight, the generation is being accounted in negative because of drawl of power from grid and accordingly deviation charges are levied. It is only during the day (time 06:45 to 17:45) that the deviation is positive due to injection of power into the grid. Thereafter, during night hours (time 18:00 to 23:45) generation is again in negative due to drawl of power during night hours and DSM charges are imposed.

26. In the light of above, the Appellant submitted that all the other solar developers operating throughout India procure unscheduled power from the grid during night hours and the accounting of the same is being done in negative and accordingly DSM charges are levied on the said developers, therefore, even till date the accounting of unscheduled procurement by the solar generators during night hours is being carried out by RLDCs (including WRLDC) under the DSM only and it is only the Appellant, and few other generators in the Western Regions, which through the Impugned Order is arbitrarily restrained from procuring power from grid and has been directed to sign alternative arrangement with the State Distribution Licensee or any other entity through open access.

27. In addition to the above, the Appellant submitted that the Central Commission subsequent to the passing of the Impugned Order has issued CERC (Indian Electricity Grid Code) Regulations, 2023 (in short "IEGC 2023"), wherein

under Clause 45 (15) it has specifically addressed the issue in question and has allowed drawl of power during non-generation hours on payment of deviation charges as per the DSM Regulations. Relevant extract of Clause 45 (15) of the IEGC 2023 are reproduced below for the sake of ready reference:

*“45 GENERAL PROVISIONS*

*...*

*(15) For meeting its power requirements during non-generation hours, whether before or after COD, a generating station, including renewable energy generating station, shall enter into a valid contract with a seller or distribution licensee or through power exchange:*

***Provided that where the generating station including a renewable energy generating station is unable to enter into a contract for the drawl of power during non- generation hours, it may draw power from ISTS on payment of deviation charges as per the DSM Regulations.”***

**[Emphasis Supplied]**

28. The Appellant argued that the DSM Regulations 2022 were notified and were brought into effect from 05.12.2022 and the IEGC 2023 were notified and brought into effect from 01.10.2023, therefore, from the date of coming into effect of DSM Regulations 2022 were brought into effect (further being clarified vide IEGC 2023), SPDs like the Appellant can now avail its requirements of power during non-generation hours under the DSM Regulations which has been the case of the Appellant in the present Appeal, further, WRLDC vide its letter dated

15.09.2023 has intimated to all the generators (including Appellant) about the aforesaid change in regulatory regime qua such power during non-generating hours, thus, the stance of WRLDC supports the Appellant's case that it ought to be allowed to settle charges for such power requirement during non-generation hours under the DSM Regulations.

29. Further, submitted that the Central Commission while passing the Impugned Order has gone beyond the relief sought by MPPMCL and has altogether devised new mechanism (without any specific prayer / pleading made out by MPPMCL during the proceedings before Central Commission in Petition No. 345/MP/2018), it is submitted that the Central Commission, upon identifying a regulatory gap for the treatment of power drawn for non-operational hours, should have rather addressed the same by way of an amendment to the extant regulatory framework and not by way of a judicial order during a miscellaneous proceedings initiated by MPPMCL.

30. The Appellant emphasised that the Central Commission at para 37 of the Impugned Order has wrongly referred to the power purchase agreement between SECI and another solar power developer, under both MPPMCL PPA and DMRC PPA, there is no provision requiring the Appellant to procure auxiliary power from MPPMCL or any other DISCOMs in the area of supply, on the contrary, the Appellant in the present case is directly connected to the CTU's network and has no direct physical connection to any State Network or the network of State DISCOM / MPPMCL, therefore, it is impossible for the Appellant to procure / purchase any power from MPPMCL during non-generation hours and such power been procured while using the CTU's network can only be accounted as deviation

under the DSM Regulations, additionally, this Tribunal in catena of judgments, including M/s Sree Rengaraaj Ispat Industries Pvt. Ltd. vs TNEB & Ors. – Appeal No. 190 of 2013 (para 17 & 18) & Tamil Nadu Generation & Distribution Corp. Ltd. vs. Lanco Tajore Power Co. Ltd. & Anr. – Appeal No. 240 of 2013 (para 39 to 44), has held that the generator cannot be a consumer of a distribution licensee and the power procured by it for auxiliary / start-up purposes cannot be treated as power being supplied by a distribution licensee to its consumer, therefore, since the Appellant cannot be a consumer of a distribution licensee and is also not directly connected to any State network, the directions passed by the Central Commission in the Impugned Order (to this limited extent) are contrary to law and are required to be set-aside.

31. Also pleaded that after notification of DSM Regulations 2022 *inter-alia* read along with IEGC 2023, the Appellant can now avail its requirements of power during non-generation hours by paying deviation charges under the DSM Regulations, therefore, to the extent period post 05.12.2022 is concerned, the same is covered as per DSM Regulations 2022 read long with IEGC 2023, therefore, considering that the period till passing of the Impugned Order plus 30 days (i.e., till 25.05.2022) has already been regularized by the Central Commission in the Impugned Order and the period post 05.12.2022 is covered as per CERC DSM Regulation 2022, therefore, the only period concerned in the present Appeal is between 26.05.2022 to 05.12.2022, accordingly, the only remaining issue before this Tribunal is the treatment of such power for the period between 26.05.2022 to 05.12.2022 whereafter the prevalent regulatory regime under the DSM Regulations 2022 and the IEGC Regulations 2023 clearly affirms the case of the Appellant.

32. In the light of above and the mechanism as submitted by WRLDC, which has already been allowed by the Commission (till 25.05.2022), for the period between 26.05.2022 till coming into effect of DSM Regulations 2022 i.e., 05.12.2022, the appellant be allowed to draw power for non-generation hours as unscheduled interchange as per DSM Regulations 2014, which is also in conformity with the industry-wide practice being followed by other RLDCs and generators throughout India (Ref. Memo dated 13.02.2023).

33. The Respondent No. 2, MMPMCL submitted that:

- a. the Petition No. 345/MP/2022 was filed by the answering Respondent for dealing with drawl of power during non-generation night hours and during shut down for maintenance and other purposes enabling treatment of such power by the concerned entities and the concerned Regional Load Despatch Centers (RLDCs), as the existing regulations did not provide for any treatment of such power and it was prayed for issuance of appropriate directions/guidance for providing appropriate treatment to power drawn by CTU-connected solar power projects during non-generation night hours and during shutdown periods and for determination of tariff thereof.
- b. From the prayers sought for by the Appellant, it is an admitted position that SPDs like the Appellants draw power during shutdown period and non-generation hours.

c. Subsequently, the Central Commission has notified the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2023 and in light of the coming into force of the aforementioned regulations, the lacunae have been covered and the limited issue in the present appeal remains for the interregnum period from the date of the impugned judgement till the date of notification of the above regulations, accordingly, this Tribunal may take into account the above and pass appropriate directions for treatment for the interregnum period and dispose of the Appeal.

34. There was no response in the form of oral arguments or written submission has been received from Respondent No. 1, the Central Commission, therefore, the Impugned Order itself is considered as the submission of the Central Commission, the Central Commission in the Impugned Order has held as under:

“36. The Petitioner has further argued that as per the PPAs between SECI and the Respondent-SPDs, the energy drawn from the grid will be regulated as per the regulations of respective State Commission where the projects are located. In the instant case, as per the Petitioner, MPERC through the MPERC Regulations, 2010 and subsequent amendment provides treatment for power drawn by the generator/ co-generation from renewable.

37. We observe that the relevant Clauses in PPA are as under:



*“6.1.4 Auxiliary power consumption will be treated as per the concerned State regulations.*

*ii. The SPD shall be required to make arrangements and payments for import of energy (if any) as per applicable regulations.*

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*10.2.1 The SPD shall issue to SECI hard copy of a signed Monthly Bill/Supplementary Bill for the immediately preceding Month/relevant period based on the issuance of Energy Accounts along with all relevant documents (payments made by SPD for drawal of power, payment of reactive energy charges, Metering charges or any other charges as per guidelines of SERC/CERC, if applicable.*

*Each Monthly Bill shall include all charges as per this Agreement for the energy supplied for the relevant Month based on Energy Accounts issued by RPC or any other competent authority which shall be binding on both the Parties. The Monthly Bill amount shall be the product of the energy as per Energy Accounts and the Applicable Tariff. Energy drawn from the grid will be regulated as per the regulations of the respective State the Project is located in.”*

35. At the outset, the Commission would like to state that the provisions any PPA cannot be in derogation of or in conflict with any provision of the Act or the Regulations. In case of conflict, the provisions of the Act and the

Regulations will prevail over the provisions of the PPA. In the instant case, however, the Commission does not find any conflict. **Rather, the PPA provides in clear terms that “the SPD shall be required to make arrangements and payments for import of energy (if any) as per applicable regulations”.** This is exactly in line with the interpretation of the Commission in the context of Issue (a) and Issue (b). The DSM Regulations, 2014 do not make a provision for solar generators drawing power during night hours and/or for maintenance and shut down. This should be interpreted to mean that such solar generators cannot meet their drawl requirement through DSM but need to enter into power purchase arrangement for such drawl. Such power purchase arrangement can be with the distribution licensee of the State in which the generator is located or with any other entity through open access. It is only when the arrangement is made with the State in which the generator is located that the „energy drawn from the grid will be regulated as per the regulation of the respective State the Project is located in“. In the instant case, there is no such arrangement between the SPDs and the distribution licensee(s) of MP. As such, the energy drawn by the SPDs during night hours and/or for maintenance and shut down cannot be accounted for as import from the distribution licensee of MP. For such energy accounting, power purchase arrangement and drawl schedule of SPDs and the corresponding injection schedule of the distribution licensee(s) are a pre-condition. In the absence of any such arrangement, the prayer of the Petitioner that it be allowed to bill the SPDs towards power drawn during non-generation night hours and during shutdown periods or during any emergencies including their repair and maintenance, etc. is rejected.

36. However, we could not find any provision in the PPA as aforequoted by the Central Commission in para 37 of the Impugned Order, Article 6 of the PPA filed By the Appellant is quoted as under:

“

**6. SUPPLY ARRANGEMENTS**

*6.1 The energy generated from the Unit shall be injected at the Injection Point for sale to the Procurer, through the Internal Evacuation Infrastructure, in accordance with the Coordination Agreement.*

*6.2 Prior to testing and synchronisation of the Unit, the SPD shall comply with all requirements of the Central Electricity Regulatory Commission (Grant of Connectivity, Long- term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 and also ensure that energy is injected in full compliance with the Central Electricity Authority (Technical Standards for Connectivity to the Grid) Regulations, 2007.*

*6.3 The SPD shall be responsible for designing, constructing, testing, operating and maintaining the Unit in accordance with the Applicable Laws, the terms and conditions of this Agreement, conditions specified in any Applicable Permits, Good Industry Practices and the Technical Specifications.”*

37. Further, the Central Commission in para 25 has held as under:

“25. A harmonious reading the aforesaid provisions of the Tariff Regulations, Connectivity Regulations, 2009 and the DSM Regulations,

2014 quoted above reveals that the existing regulations deal with infirm power injected into the grid prior to the COD of a generating unit of a generating station. Such infirm power is treated as deviation and is paid for at the rate of charges for deviation as specified in the DSM Regulations, 2014. However, the rates so specified in the DSM Regulations, 2014 do not include the rates for solar generators. **This infers that the solar generators may not generally need to inject/draw infirm power prior to COD**, and even if they do they will have to make other arrangements – arrangements for sale/purchase other than through DSM.”

38. The observation of the Central Commission is erroneous to the extent that the infirm power is defined as the electricity injected into the grid by a generating station prior to achieving the COD and not the drawl of power prior to COD, the Central Commission by referring the infirm power to the drawl by generating station is nothing widening the definition of the infirm power through the Impugned Order, such an interpretation is liable to be rejected.

39. It cannot be disputed that the unscheduled drawl or injection of power is a threat to the security and smooth function of the grid, however, such an exchange continues to be prevailing in the national grid, even the Central Commission under IEGC 2023 has allowed drawl of unscheduled power during non-generation hours on payment of deviation charges as per DSM Regulations, the relevant extract of the IEGC 2023 Regulations (para 45(15)) is reproduced hereunder:

*“Provided that where the generating station including a renewable energy generating station is unable to enter into a contract for the drawl of power during non- generation hours, **it may draw power from ISTS on payment of deviation charges as per the DSM Regulations.**”*

40. It is already a settled principle of law (**Supreme Court Judgment in PTC India Ltd. vs CERC**) that this “Tribunal has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.”

41. This Tribunal, thus, cannot examine the validity of the aforesaid Regulations, further, the IEGC 2023 Regulations are not only binds the Central Commission but are also binding for the contesting parties herein, accordingly, from the date of notification of IEGC 2023 Regulations, the issue stands resolved, even the Central Commission cannot pass orders in contravention to such Regulations.

42. However, as submitted by Respondent No. 2, the issue remains for the interregnum period i.e. from 25.05.2022 to the date of notification of IEGC 2023 Regulations.

43. The Appellant challenged that directions passed by the Central Commission are beyond the prayer / pleadings filed by MPPMCL in Petition No. 345/MP/2018, however, one of the prayers, as noted from the Impugned Order, made by MPPMCL in the said petition is quoted as under:

*“The Petitioner has made the following prayers:*

- (i) formulate appropriate tariff and other treatments in respect of power drawn by solar projects during non-generation night hours and during shutdown periods;”*

44. From the above, it is clear that MPPMCL has prayed for formulating appropriate tariff and other treatments, we are satisfied that the Central Commission has passed the Impugned Order by formulating the terms and conditions for the Tariff and treatment of such drawl, we, therefore, reject the contention of the Appellant on this count.

45. The Appellant submitted that the drawl of power by it, during non-generation hours is less than 3 MW, as such under the relevant GNA/ Open Access Regulations, it cannot seek GNA / the Open Access for procurement of power through open access as the eligibility criteria is minimum of 50 MW.

46. We are inclined to accept the contention of the Appellant, the direction of the Central Commission is in violation of its own Regulation which is a binding on the Central Commission also, or otherwise, the Central Commission while passing the Impugned Order has relaxed the conditions laid down there.

47. We also accept the submission of the Appellant that the aforequoted State Regulations are not applicable to its power project as the SPP is not connected to the State Transmission or Distribution grid, the Central Commission has erred to take the note of such submission by the Appellant, the Appellant can procure

power from the State Discom only through Open Access under the GNA Regulations, which is also ruled out as observed above.

48. We are anguished by the fact that except few generators including the Appellant, all other are drawing power under un-scheduled interchange mechanism and the Central Commission has not passed any such order against those generators, in spite, has notified the IEGC 2023 Regulations allowing such a drawl of power on payment of deviation charges as per the DSM Regulations.

49. Further, treating / accounting night time / non-generation hours drawls under the DSM Regulations by WRLDC is as per the standard practice being adopted throughout India and also approved by the Central Commission till 25.05.2022 and further, making a provision for treating the same under DSM Regulations by notifying the IEGC 2023 Regulations, as also agreed by the MPPMCL, the petitioner raising the issue in Petition No. 345/MP/2018 filed before CERC, we find the Impugned Order unjust and unreasonable.

50. Considering that the other two captioned Appeals are identical and have raised exactly same issue, the conclusion made as above is also applicable for those appeals also.

51. The drawl of power during the interregnum period i.e. from 25.05.2022 to the date of notification of IEGC 2023 Regulations shall be charged as per DSM Regulations and post applicability of IEGC 2023 Regulations, the same shall be in accordance with IEGC 2023 Regulations read with DSM Regulations.

**ORDER**

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal Nos. 203 of 2022, 242 of 2022 and 248 of 2022 filed by M/s. Arinsun Clean Energy Private Limited, M/s. Mahindra Renewables Private Limited and M/s. Athena Jaipur Solar Power Private Limited have merit and are allowed.

The Order dated 25.04.2022 passed by the Central Electricity Regulatory Commission in Petition No. 345/MP/2018 is set aside.

The Appeals and pending IAs, if any, are set aside in above terms.

**PRONOUNCED IN THE OPEN COURT ON THIS 8<sup>TH</sup> DAY OF APRIL, 2024.**

**(Virender Bhat)**  
**Judicial Member**

**(Sandesh Kumar Sharma)**  
**Technical Member**

*pr/mkj*