

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.merc.gov.in

Case No. 60 of 2020 and MA No. 38 of 2020

Case of Lalpur Wind Energy Private Limited under Section 86 of the Electricity Act, 2003 seeking directions against Maharashtra State Electricity Distribution Company Limited qua supply of power from its 5.6 MW Wind Turbine Generators located at Ahmednagar, Maharashtra

Lalpur Wind Energy Private Limited Petitioner
Maharashtra State Electricity Distribution Company Ltd. Respondent No. 1
Maharashtra Energy Development Agency Respondent No. 2
Maharashtra State Load Despatch Centre Respondent No. 3

Coram

**I.M. Bohari, Member
Mukesh Khullar, Member**

Appearance

For the Petitioner	: Smt. Deepa Chavan (Rep.)
For	
Respondent No. 1	: Sh. Harinder Toor (Rep.)
Respondent No. 2	: Sh. Manoj Pise (Rep.)
Respondent No. 3	: Sh. Anil Kolap (Rep.)

ORDER

Date: 4 July, 2020

1. Lalpur Wind Energy Private Limited (**LWEPL**) filed the present Petition on 26 February, 2020 under Section 86 of the Electricity Act, 2003 (**EA**) seeking directions against Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) qua supply of

power from its seven Wind Turbine Generators (**WTGs**) aggregating 5.6 MW (7x 0.8 MW WTG).

2. LWEPL's main prayers are as follows:

- (a) *Direct MSEDCL to comply with its Wind Policy, 2014 and the Government of Maharashtra's RE Policy, 2015 and accordingly execute EPAs with the Petitioner qua the seven WTGs aggregating 5.6 MW (for WTG details refer Table No. 1 above), for a period of 13 years from the date of their commissioning i.e. 05.11.2014, at the levellised generic tariff of Rs. 5.70/ kWh determined by this Hon'ble Commission (for Wind Zone 1) vide its Generic Tariff Order dated 07.07.2014 in Case No. 100 of 2014;*
- (b) *Direct MSEDCL to pay an amount of Rs. 27,18,62,464 (Rupees Twenty Seven Crores Eighteen Lacs Sixty Two Thousand Four Hundred & Sixty Four only) [inclusive of interest/ late payment surcharge at the rate of 15% per annum as envisaged in the EPAs executed between wind developers and MSEDCL] as compensation to the Petitioner towards power supplied from the Petitioner's seven WTGs to MSEDCL from 05.11.2014 till 31.01.2020;*
- (c) *Direct MSEDCL to pay tariff at the rate of Rs. 5.70/ kWh for the power supplied by the Petitioner to MSEDCL for the period beyond 23.01.2020 alongwith interest/ late payment surcharge at the rate of 15% per annum till realisation;*

Amended Prayers through MA No. 38 of 2020 dated 23 May, 2020

- (d) *Pass an ex-parte ad interim order staying the operation of MSEDCL's Disconnection Notice/ e-mails dated 22.05.2020 and 23.05.2020 pending final adjudication of the present Petition;*
- (e) *Pass an ex-parte ad interim order directing MSEDCL and MSLDC to refrain from disconnecting or taking any coercive action against the Petitioner's duly commissioned WTGs aggregating 5.6 MW, pending final adjudication of the present Petition;*
- (f) *Pass an ex-parte ad interim order directing MSEDCL and MSLDC to maintain status quo qua the Petitioner's duly commissioned WTGs aggregating 5.6 MW, pending final adjudication of the present Petition;*

3. LWEPL in its Case has stated as follows:

- 3.1. LWEPL has setup a 50.4 MW wind power project in Ahmednagar, Maharashtra out of which, 45.6 MW has been commissioned in phases between 29 September 2014 to 17

November 2014. The capacity of 4.8 MW is yet to be commissioned. The present dispute relates to 5.6 MW (7 x 0.8 MW WTG) which forms part of the 45.6 MW commissioned capacity. The table below provide details of the 7 WTGs under dispute:

Sr. No.	Location	Gut No.	Commissioning Date
1.	A11	26	05.11.2014
2.	A12	30	05.11.2014
3.	A26	186	05.11.2014
4.	A27	185	05.11.2014
5.	N22	159/1	05.11.2014
6.	N27	118	05.11.2014
7.	N33	445/B	05.11.2014

- 3.2. In the year 2008, the Government of Maharashtra (**GoM**) notified the 'New Policy for Generation of Power from Non-conventional sources of Energy, 2008' (**RE Policy 2008**) which provided for wind capacity addition of 2000 MW. The capacity envisaged under the RE Policy 2008 was exhausted in FY 2013-14.
- 3.3. Thereafter on 3 June, 2014, MSEDCL notified its Wind Policy, 2014 which promised wind generators, that MSEDCL would execute Energy Purchase Agreements (**EPAs**) on the basis of their date of commissioning and the capacity to be identified by the GoM. MSEDCL's Wind Policy, 2014 did not require any infrastructure clearance and/or registration with any Nodal Agency for the execution of EPAs with MSEDCL.
- 3.4. During the period of March 2014 to November 2014, LWEPL commissioned 45.6 MW of capacity out of the total Project capacity of 50.4 MW. The capacity of 45.6 MW commissioned includes the seven WTGs aggregating 5.6 MW. These WTGs were set up and commissioned in terms of the promise made by MSEDCL vide its Wind Policy, 2014.
- 3.5. Having commissioned its Project, LWEPL approached MSEDCL for executing EPAs for the 45.6 MW capacity. However, MSEDCL has executed EPAs with LWEPL for 40 MW (in phases) between 5 August 2014 to 9 August 2017. MSEDCL has till date not executed EPAs for the remaining 5.6 MW capacity (7 WTGs of 0.8 MW) which were commissioned during the same period as the remaining other 40 MW capacity for which the EPAs were duly executed.
- 3.6. In June 2015, the GoM notified the RE Policy, 2015. The said Policy envisaged addition of 5000 MW wind capacity in the State of Maharashtra. Out of the said 5000 MW, 1500 MW was earmarked for MSEDCL to meets its Renewable Purchase Obligation (**RPO**) targets. The RE Policy, 2015 envisaged formulation of a suitable methodology for the installation, commissioning and effective implementation of RE projects. Maharashtra

Energy Development Agency (**MEDA**) was notified as the Designated Agency to give effect to the RE Policy, 2015 in terms of the methodology. The said Policy, required wind projects to register with MEDA as a prerequisite for executing EPAs with MSEDCL/ availing Open Access etc. Before the RE Policy 2015 came into effect, MSEDCL had already executed EPAs with LWEPL for 8.8 MW capacity. However, MSEDCL did not execute EPAs with LWEPL for the balance capacity of 36.8 MW, contrary to MSEDCL Policy, 2014. Therefore, for the remaining 36.8 MW capacity (which was not tied up prior to the RE Policy 2015) LWEPL was required to register the WTGs with MEDA as a prerequisite for executing EPAs with MSEDCL as per the RE Policy 2015. It is noteworthy that, the RE Policy, 2015 specifically included projects of 1350 MW capacity which had been commissioned after expiry of the RE Policy, 2008 and before RE Policy, 2015 came into effect for procurement by MSEDCL towards meeting its RPO targets. LWEPL seven WTGs aggregating 5.6 MW falls within this identified 1350 MW capacity.

- 3.7. On 26 February 2016, LWEPL made the relevant application to MEDA seeking registration of its WTGs. The registrations for the said WTGs came through in phases. As regards the seven WTGs aggregating 5.6 MW, which are the subject matter of the present dispute, the MEDA registration came through on 25 November 2019 i.e. after an inordinate delay of more than 3 years. This delay was not to the account of LWEPL. In fact, during the period 2016 to 2019, LWEPL had regularly followed up with MEDA for the registration of its seven WTGs. Immediately after the MEDA registration came through for the seven WTG's (i.e. on 25 November 2019), on 5 December 2019, LWEPL wrote to MSEDCL requesting it to execute EPAs for the seven WTGs (5.6 MW). Since no response was forthcoming from MSEDCL, on 30 January 2020, LWEPL once again wrote to MSEDCL requesting it to execute EPAs qua the seven WTGs. However, MSEDCL vide its letter dated 24 January 2020 (received by LWEPL on 7 February 2020) has denied the requests for execution of EPAs qua the seven WTGs aggregating 5.6 MW, citing a change in policy pursuant to which, (post-2017) MSEDCL is procuring RE power to meet its RPO targets only through competitive bids, thereby completely renegeing from its promises in terms of the earlier MSEDCL Policy 2014 and the RE Policy 2015.

Aggrieved by MSEDCL's refusal to sign EPAs for the seven WTGs aggregating 5.6 MW, LWEPL is constrained to file the present Petition on the following, amongst other, grounds:

Ground 1: MSEDCL is required to execute EPAs with the Petitioner in terms of its Wind Policy, 2014 and the RE Policy, 2015

- 3.8. LWEPL has setup and commissioned its Project (45.6 MW) in terms of the policies of MSEDCL and the State Government of Maharashtra on the promise of tying up the entire power generated from its WTGs with MSEDCL for its RPO compliance. In terms of

Clause 3 of MSEDCL's Wind Policy, MSEDCL made an unequivocal promise to developers that it would sign EPAs in chronological order on the basis of their commissioning date for capacity to be determined by the State of Maharashtra. The said MSEDCL Wind Policy, 2014 did away with the requirement of an Infrastructure Clearance/ WTG Registration (which existed in the prior RE Policy, 2008) thereby making it convenient and easier for generators to commission their WTGs and execute EPAs with MSEDCL. This was subsequently clarified by MSEDCL vide its Clarification dated 26.09.2014. LWEPL duly accepted such promise made by MSEDCL/GoM, and duly commissioned its Project from March, 2014 to November, 2014. The seven WTGs aggregating 5.6 MW were commissioned on 5 November 2014.

- 3.9. Out of the 45.6 MW commissioned capacity, MSEDCL has executed EPAs with WTGs aggregating 40 MW. EPAs for WTGs aggregating 8.8 MW were executed in the month of August, 2014. Thereafter, LWEPL followed up with MSEDCL during FY 2014-2015 requesting MSEDCL to execute EPAs qua its balance capacity aggregating 36.8 MW capacity. Out of the remaining 36.8 MW, MSEDCL has executed EPAs for 31.2 MW from March, 2017 to August, 2017. However, contrary to the promise made by MSEDCL in its Wind Policy, 2014, MSEDCL did not execute EPAs for 5.6 MW. MSEDCL's inactions in not executing the EPAs is in teeth of the applicable policies.
- 3.10. It is pertinent to note that vide an Affidavit dated 22 January 2015 in Case No. 190 of 2014 (suo-moto proceedings initiated by the Commission to ascertain RPO compliance by MSEDCL), MSEDCL has submitted before the Commission that for meeting its RPO targets for FY 2014-15, MSEDCL is executing EPAs with all renewable (non-solar) generators approaching MSEDCL, at preferential tariff in line with the terms and conditions specified by the Commission. Further, in the very same Affidavit, MSEDCL has stated that it has contracted sufficient RE power for meeting RPO targets for FY 2014-15 and FY 2015-16. Accordingly, MSEDCL had placed on record that 400 MW of capacity addition is expected in the State of Maharashtra in FY 2014-15. In its Affidavit, MSEDCL has stated that it shall be executing EPAs with generators commissioning their wind power plants in FY 2014-15 in order to comply with its RPO targets. Since the LWEPL's seven WTGs aggregating 5.6 MW have been commissioned on 05.11.2014 (i.e. in FY 2014-15), the said capacity is part of the 400 MW expected capacity addition in FY 2014-15 for which MSEDCL was to execute EPAs.
- 3.11. However, contrary to the promise made by MSEDCL in its Wind Policy, 2014 and contrary to the averments made by MSEDCL in its Affidavit dated 22.01.2015, MSEDCL has failed to sign EPAs with LWEPL for the seven WTGs aggregating 5.6 MW which were commissioned in FY 2014-15. In fact, from details available in the public domain (MEDA website), it is seen that during the year FY 2014-15 only 364.15 MW capacity of

wind power was commissioned in the State of Maharashtra i.e. less than the 400 MW projected by MSEDCL in its Affidavit dated 22.01.2015. Further, LWEPL's seven WTGs aggregating 5.6 MW are also mentioned in the said MEDA list. Hence, there was no occasion for MSEDCL to not execute EPAs for the seven WTGs aggregating 5.6 MW (commissioned on 5 November 2014) which formed part of the capacity that MSEDCL had promised it would tie up for meeting its RPO requirements.

3.12. Since MSEDCL did not execute EPAs in terms of its Wind Policy, 2014, LWEPL was compelled to seek the benefit of the subsequent RE Policy, 2015 notified by the Government of Maharashtra on 20 July 2015 and accordingly LWEPL was constrained to seek registration of its WTGs (which were already commissioned in the year 2014) with MEDA. It is submitted that, had MSEDCL executed the EPAs in terms of its Wind Policy, 2014 and the promise made by it in its Affidavit dated 22 January 2015, the LWEPL would not have been required to seek MEDA Registration.

3.13. LWEPL's seven WTGs aggregating 5.6 MW in capacity were commissioned on 05.11.2014 i.e. after the expiry of the RE Policy, 2008 and before the notification of the RE Policy, 2015. Further, the entire 2000 MW capacity addition envisaged under the RE Policy 2008 was exhausted in the year 2013-14. Therefore, it is conclusively established that the seven WTGs aggregating 5.6 MW:-

- (a) Form part of 1350 MW capacity that relates to WTGs commissioned after expiry of the RE Policy 2008 and before notification of the RE Policy 2015. Accordingly, the seven WTGs are part of the 1500 MW earmarked by the RE Policy, 2015 for procurement by MSEDCL towards meeting its RPO targets.
- (b) The seven WTGs have to be given preference for registration by MEDA and execution of EPA by MSEDCL at the generic levelled preferential tariff determined by the Commission vide its Generic Tariff Order dated 07.07.2014.
- (c) MSEDCL was mandated to execute / sign EPAs for the same.

3.14. Even as per MSEDCL's understanding, LWEPL's seven WTGs aggregating 5.6 MW falls within the capacity of 1500 MW. This is evident from the JMRs undertaken by MSEDCL pursuant to which it has issued Credit Notes to during the years 2015 to 2019 for electricity generated by LWEPL's seven WTGs. Hence, MSEDCL cannot on one hand take the view that the seven WTGs aggregating 5.6 MW form part of the capacity of 1500 MW identified by the RE Policy 2015 for meeting MSEDCL's RPO targets, while on the other hand refuse to execute EPAs for the said seven WTGs.

3.15. By refusing to execute EPAs, MSEDCL has failed to implement the policy decision of the State Government which runs the risk of rendering the RE Policy, 2015 a dead letter. It is submitted that the said policy has been issued by the State Government in exercise of its

executive and policy making powers guaranteed under Article 166(3) of the Constitution of India. MSEDCL, being State within the meaning of Article 12 of the Constitution of India is mandated to give effect to and follow the policy decisions of the State Government. Today, MSEDCL cannot contend that due to a change in its (internal) policy, it is only procuring power through competitive bidding and therefore LWEPL needs to participate in a competitive bid floated by MSEDCL for tying up its seven WTGs with MSEDCL. MSEDCL's new (internal) policy cannot possibly override the GoM's RE Policy 2015 which clearly mandates EPA execution for WTGs aggregating 1500 MW.

Ground 2: Delay in grant of registration was not on account of LWEPL's inactions

3.16. The Clauses 2.5 and 2.9 of the RE Policy, 2015 read with Clause 7 of the MEDA Methodology, 2015 mandatorily required that projects commissioned and considered for the capacity addition of 1500 MW to meet MSEDCL's RPO targets have to be registered with MEDA before executing EPAs. Only those Projects that have been registered with MEDA are eligible to execute EPAs with MSEDCL.

3.17. Out of the total commissioned capacity of 45.6 MW, MSEDCL executed EPAs with the LWEPL for 40 MW (in phases) from 5 June 2014 to 9 August 2017. Out of the 40 MW, EPAs qua 8.8 MW were executed by MSEDCL before the RE Policy 2015 came into effect. However, MSEDCL did not execute EPAs with the LWEPL for the balance commissioned capacity of 36.8 MW, contrary to its MSEDCL Policy, 2014. Therefore, for the remaining 36.8 MW capacity (which was not tied up prior to the RE Policy 2015) LWEPL was required to register the WTG's with MEDA as a prerequisite for executing EPAs with MSEDCL as per the RE Policy 2015. Therefore, LWEPL made its application to MEDA for registration on 26.02.2016. The registrations for the said WTGs came through in phases. For 31.2 MW, the registrations were received from March 2016 to May 2017 and EPAs for these capacities were executed from March 2017 to August 2017. However, for reasons best known to MEDA, the registration for the balance seven WTGs aggregating to 5.6 MW were received on 25 November 2019 i.e. after a prolonged delay of more than three years. This delay is not to the account of LWEPL. Due to the inordinate delay in registering the seven WTGs, LWEPL was unable to approach MSEDCL earlier for execution of EPAs. As a result, LWEPL had no choice but to approach MSEDCL for EPA execution on 5 December 2019.

3.18. Hence, the delay in approaching MSEDCL for execution of the EPAs was not due to any inactions on the part of LWEPL. LWEPL cannot be penalised and/ or denied the benefits of the RE Policy, 2015 on account of MEDA's delay in registering the seven WTGs.

Ground 3: Non-execution of EPA by MSEDCL is contrary to its own averments in various Affidavits filed by MSEDCL before the Commission

3.19. In its Affidavit dated 22 January 2015, MSEDCL has clearly stated that it is executing EPAs with Projects commissioning in FY 2014-15 in order to meet its RPO compliance. However, contrary to the said averment (made on oath), MSEDCL has not executed EPAs with LWEPL qua the said seven WTGs aggregating 5.6 MW. In addition to the said Affidavit, it is pertinent to note the following submissions made by MSEDCL before the Commission in various other proceedings which demonstrate that MSEDCL's conduct has been contrary to what it has averred before/ promised to the Commission:

- (a) On 10 February 2016, MSEDCL filed an Affidavit in Case No. 16 of 2016 (in the matter of verification of RPO for FY 2014-15) before the Commission stating that it had signed EPAs with all renewable (non-solar) generators approaching MSEDCL during FY 2014-15 at the preferential tariff in line with the terms and conditions specified by the Commission. Contrary to the said statement, MSEDCL has in fact not executed EPAs with LWEPL qua the seven WTGs aggregating 5.6 MW at the preferential tariff determined by the Commission, despite LWEPL approaching MSEDCL for EPA signing immediately after commissioning its seven WTGs.
- (b) On 31 January 2017, MSEDCL filed an Affidavit in Case No. 169 of 2016 (in the matter of verification of RPO for FY 2015-16) where it detailed the steps taken by it in meeting its RPO shortfall. In the said Affidavit, MSEDCL has stated that it is executing EPAs with wind generators who have commissioned their projects in FY 2014-15 and FY 2015-16 from the date of commissioning of the project. In this regard, it is noteworthy that in Annexure B (to the said Affidavit) MSEDCL has provided details of audited energy injected into the grid by WTGs which are commissioned. The quantum of energy injected into the grid from generators without signing EPAs includes LWEPL's seven WTGs aggregating 5.6 MW. Evidently, MSEDCL is aware that it is required to execute EPAs but is now refusing to execute the same.

3.20. While denying the execution of EPAs, MSEDCL vide its letter dated 24 January 2020 has stated that it has adopted the policy of procuring power through competitive bidding. In effect, MSEDCL has stated that for the seven WTGs aggregating 5.6 MW to be tied up with MSEDCL, LWEPL would have to participate in a Section 63 competitive bid process. Such a scenario will result in receiving less tariff than what has been mandated under MSEDCL's Wind Policy, 2014 read with the RE Policy, 2015 i.e. LWEPL (and all similarly placed wind generators) is entitled to a preferential tariff as determined by the

Commission for the year in which the Project has been commissioned. Since the seven WTGs have been commissioned on 5 November 2014, LWEPL is entitled to preferential tariff determined by the Commission for FY 2014-15 (i.e. Rs. 5.70 per kWh in terms of the Tariff Order dated 7 July 2014). Since LWEPL has complied with the RE Policy, 2015, and in light of the promise made by MSEDCL in its Wind Policy, 2014, MSEDCL ought to execute EPAs for the seven WTGs at the preferential tariff determined by the Commission for FY 2014-15. The developers, who have commissioned their WTG's in FY 2014-15, cannot be directed by MSEDCL to participate in competitive bids in the year 2020 given that From FY 2015 to FY 2020, there has been substantial change in technologies and capital investments for wind projects.

3.21. Hence, the Commission ought to direct MSEDCL to comply with its own averments and promises in the Affidavits filed before the Commission and enter into EPAs for the seven WTGs at preferential feed-in tariff determined by the Commission in its Generic Tariff for projects commissioning in the year 2014-15.

Ground 4: MSEDCL cannot take benefit of the power generated by the Petitioner without paying consideration for the same

3.22. LWEPL's seven WTGs aggregating 5.6 MW have been injecting power into the grid since their commissioning. By its very nature, wind power is intermittent and is continuously injected into the grid. This quantum of power (5.6 MW) is being utilised by MSEDCL/ its consumers. MSEDCL's Affidavit dated 31 January 2017 in Case No. 169 of 2016 (In the matter of MSEDCL's RPO verification for FY 2015-16) clearly establishes that MSEDCL is accounting for the electricity generated by the LWEPL's seven WTGs towards its own RPO compliance. MSEDCL has been undertaking Joint Meter Readings (JMRs) and issuing Credit Notes to the LWEPL for the seven WTGs in question.

3.23. LWEPL has supplied electricity to MSEDCL from 5 November 2014 and continues to supply power to MSEDCL till date. Having taken benefit of the electricity supplied from the date of commissioning of the seven WTGs till date, MSEDCL is duty bound to pay/ compensate the LWEPL for the same. Even, in terms of Section 70 of the Indian Contract Act, 1872 (Contract Act), a person who enjoys the benefit of a non-gratuitous act is liable to compensate the person providing such non-gratuitous act. Having taken benefit of the power generated by seven WTGs, MSEDCL is estopped from contending otherwise. LWEPL's claim in this regard is approximately Rs. 27,18,62,464/- (Rupees Twenty Seven Crores Eighteen Lacs Sixty Two Thousand Four Hundred & Sixty Four only) upto 31 January 2020 (inclusive of interest at the rate of 15% per annum as envisaged in the EPAs executed between MSEDCL and wind developers). In this regard, the table below is noteworthy:

Particulars	Amount in INR
Net Invoice Value	21,37,56,285
Interest as per EPA @ 15%	5,81,06,179
Total	27,18,62,464

3.24. From MSEDCL's conduct, it appears that MSEDCL is inclined to offtake the power generated by LWEPL's seven WTGs and consider the same for its RPO compliance, without paying the preferential feed in tariff determined by the Commission for Projects commissioned in FY 2014-15. Hence, MSEDCL is intentionally not signing the EPAs with LWEPL so as to avoid its obligation to pay for the quantum of power supplied by the seven WTGs.

3.25. In the absence of an EPA, LWEPL has not been able to raise any invoices on MSEDCL for the quantum of power injected by LWEPL into the grid from November 2014 till date. This has resulted in substantial financial strain on LWEPL.

Ground 5: MSEDCL's conduct is contrary to the Doctrine of Legitimate Expectation

3.26. The Hon'ble Supreme Court (SC) in a catena of Judgments has held that if based on a Government representation, a party alters its position then the said party has the legitimate right to seek enforcement of the said representation. The SC has dealt with the Doctrine of Legitimate Expectation as under:

- (a) If a private party alters its position based on a representation then it is not necessary for the party to prove any damage or detriment as long as the party has simply altered its position.
- (b) In situations where even though a person has no enforceable right yet he is affected or likely to be affected by the order passed by a public authority the courts have evolved the principle of legitimate expectation.
- (c) 'Legitimate expectation' is capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.
- (d) Fair procedure and just treatment are at the core of jurisprudence. No one should suffer for omission in law or technicalities in rules.
- (e) Private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty.
- (f) If a right had been enjoyed previously by private parties then the parties have a legitimate expectation to enjoy the same unless the right has been withdrawn with a rationale behind it.
- (g) Denial of legitimate expectation amounts to denial of rights guaranteed to a party by the Government.

3.27. In this regard, reference may be made to the following Judgments:

- (a) Delhi Cloth and General Mills Limited v. Union of India [(1988) 1 SCC 86].
- (b) Monnet Ispat and Energy Limited v. Union of India [(2012) 11 SCC 1].
- (c) Punjab Communications Limited v. Union of India [(1999) 3SCC 499].
- (d) Union of India v. Hindustan Development Corporation and Others [(1993) 3CCC 499].
- (e) Ashoka Smokeless Coal India (P) Limited v. Union of India [(2007) 2 SCC 640].

3.28. LWEPL's decision to set up its Project in the State of Maharashtra is premised on a guarantee by the GoM, MEDA and MSEDCL that MSEDCL shall execute EPAs with project developers, upto 1500 MW, as long as the Projects have been commissioned under the aegis of the RE Policy, 2015. However, refusing to execute EPAs even after LWEPL has complied with the requirements under the RE Policy, 2015 and the MEDA Methodology, 2015 goes against the Doctrine of Legitimate Expectation. Hence, MSEDCL ought to be directed to forthwith execute EPAs with LWEPL for the seven WTGs.

3.29. The Commission may direct MSEDCL to forthwith execute EPAs with LWEPL with respect to its seven WTGs aggregating 5.6 MW at the levelised generic feed in tariff of Rs. 5.70/ kWh (for Wind Zone 1) determined by the Commission vide the Generic Tariff Order dated 7 July 2014 in Case No. 100 of 2014 for wind energy projects commissioned in FY 2014-15.

4. MSEDCL in its reply dated 28 April 2020 made the following submissions:

4.1. MSEDCL is under no obligation to execute PPA/ EPA with any party. Further, MSEDCL has not given any consent in respect of signing PPA/ EPA to LWEPL. Since there is no EPA executed between the parties, the present case may not fall within the jurisdiction of the Commission.

4.2. In regard to the 'Clarifications to MSEDCL New Policy for Wind Energy Generators/Developers' letter issued by MSEDCL, it has been clearly stated that, "*MSEDCL at its sole discretion, will take a decision whether or not to enter into an EPA*".

4.3. MSEDCL has never made any promise or any agreement with LWEPL hence the question of promissory estoppels doesn't arise

4.4. Accordingly, the claim made by LWEPL for an amount of Rs. 27,18,62,464 (Twenty Seven Crores Eighteen Lacs Sixty Two Thousand Four Hundred and Sixty Four only) also needs to be rejected. The present case being devoid of merits should be dismissed.

- 4.5. The Commission has time and again upheld that a Generator cannot keep pumping power into the grid without valid EPA or open access permission. The Commission vide order dated 11 April 2018 passed in Case No. 86 of 2016 has categorically held that:

“3) In pursuance of this notice, Gopani should have stopped injecting power from its CPP into the grid of MSEDCL after 4 March, 2016, but did not. Hence, Gopani is not entitled to any payment for the power injected thereafter, when the EPA no longer subsisted. This principle has been recently reiterated by the APTEL in its Judgment dated 8 May, 2017 in Appeal No. 120 of 2016 as follows:

“10. I (iv) ...The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.”

- 4.6. The above principle has again been reiterated and upheld by the Commission vide Order dated 25 July 2018 passed in Case No. 120 of 2018 wherein the Commission has held that:

“21. The Commission notes that merely on the basis of the MSEDCL’s willingness to accept the proposal for execution of Long term EPA, GIE has injected power in the MSEDCL’s grid without any valid EPA or formal contract. In fact, no valid EPA has eventually materialized between MSEDCL and GIE. The Commission while noting this fact rules that in line with the principle as set out in APTEL Judgment dated 8 May, 2017 in Appeal No. 120 of 2016 GIE is not entitled to any payment for the power injected, if any, other than that injected during FY 2014-15 for which MSEDCL has already made payment to GIE. In order to maintain the grid discipline the Commission rules that GIE and for that matter any other RE Generator should not inject its power into the grid of MSEDCL or any Distribution Licensee without any valid contract or EPA.”

- 4.7. LWEPL has emphasized on the Policy of GoM. In this regard it is to submit that, in similar such matter in case no. 121 of 2018 dated 23.07.2018 filed by M/s Ultra mega Power Private Limited (formerly R.S. India Power Ltd), the Commission has categorically ruled that, “applicability of the administrative Policy of the Government on Renewable power is not relevant for a Petition before this Commission as no legal right accrues with Petitioner unless an EPA is executed between the Licensee and the Generator”. The relevant abstract of said order are reproduced as under:

“9. RPO provisions make it clear that a Distribution Licensee can decide how it wishes to fulfill its RPO – by its own generation, by procurement of RE power, by purchase of RECs or through a combination of these. To the extent that it chooses to procure power,

there is no requirement to do so from one particular Generator or the other. In that Order the Commission has further held that just as the Distribution Licensee has several options for fulfillment of its RPO; RE Generators also have several alternatives besides sale of power to a Distribution Licensee, which they can be expected to explore such as the options of sale to OA consumers or through Power Exchanges.

10. The Commission also notes that a Distribution Licensee should plan its power procurement considering various factors such as the power demand and supply position, grid/system conditions, availability of cheaper power thereby providing lowest tariff to its consumers (i.e. protecting the interest of the consumers) and at the same time protecting its commercial and financial interest as well. The Commission observes that the Ministry of Power, Government of India has also issued guidelines under Section 63 of EA, 2003 for conducting a Competitive Bidding process for procurement of power from RE sources (wind and Solar) and the tariffs discovered by Competitive Bidding are considerably lower than the RE generic tariffs as determined under Section 62 of the EA, 2003. Since the tariff rates discovered by Competitive bidding process are considerably lower than the generic tariffs, many of the Distribution Licensees have carried out the Competitive bidding process rather than exercising the option to purchase RE at a generic tariff. In those Cases the Commission has also adopted the discovered tariff rate as mandated under section 63 of EA, 2003, in its various recent Orders. UMPPL can explore such options as cited earlier in this Order for sale of its wind power including participation in the Competitive bidding process that may be conducted in future.

11. In view of foregoing the Commission rules that MSEDCL cannot be directed to sign an EPA with any particular RE Generator, UMPPL in this Case or the other, for purchase of power at the generic tariff of Rs. 5.74 per unit.

12. The Commission notes the submission of MSEDCL that it has not given any consent in respect of signing of an EPA to UMPPL and admittedly no EPA has been executed between them. Accordingly, in light of the discussion as set out at para 9,10 above, the Commission rules that signing of EPA by MSEDCL with a particular RE generator or with any other generator is entirely its own prerogative/right. ..”

4.8. MSEDCL being a State Utility has always abided by the directions of the Commission. MSEDCL strictly follows the various Orders passed by the Commission on the issue of EPA or open access permission.

4.9. Regarding compensation, it is to submit that LWEPL doesn't have the permission to pump the power into the grid without valid EPA and Open Access.

4.10. An obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. The above statement is upheld by APTEL in its Judgment dated 16 April, 2015 in Appeal No. 258 of 2013. The relevant abstract is reproduced as follows:

“71 (ii) An obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. However, a distribution licensee has to exercise the option based on economic principles. An obligated entity other than the distribution licensee may also opt for purchase of REC for fulfilling its RPO obligation to avoid the issues involved in banking, open access, sale of surplus power, etc., or if the RPO requirement is too small.”

4.11. MSEDCL is fulfilling its non-solar RPO by purchasing RE power from different sources like wind, bagasse, biomass and small hydro projects. Also, some time by purchasing RECs from open market. Further the manner of purchase of this RE power is the sole discretion of MSEDCL.

4.12. MSEDCL has fulfilled its standalone as well as cumulative non-Solar RPO targets till FY 2017-18 with a surplus of 55.151 MU as approved by the Commission vide dated 27 March 2019 in Case No. 36 of 2019.

4.13. Since December 2017 MSEDCL has taken decision to procure RE power through competitive bidding procedure and no EPA has been signed with wind generators at preferential tariff thereafter.

4.14. MSEDCL has successfully implemented the procurement of 500MW wind power through competitive bidding process with e-reverse auction on long term basis for 25 years from COD from proposed wind power projects. LWEPL had the options of participating in such tendering process, however it has not participated.

4.15. MSEDCL is purchasing RE power through a transparent and fair process of competitive bidding abiding by all rules and regulations hence the allegations mentioned in this regard are strongly denied.

4.16. MSEDCL's Wind Policy dated 3 June 2014 and the clarification dated 26 September 14 issued thereof are kept in abeyance with immediate effect from 6 February 2015 no EPA with wind generators were executed during the intervening period.

4.17. GoM vide letter 17 July 2017 has approved the purchase of Wind Power, Solar Power & Bagasse based cogeneration Power through Competitive Bidding.

- 4.18. MSEDCL is a state utility catering to consumers throughout the State and prayers as prayed by LWEPL, if granted, would make MSEDCL to pay LWEPL costlier tariff as the rates of wind power project discovered through competitive bidding (at around Rs. 2.87 per unit) are much cheaper than the preferential tariff (at around Rs. 5.70 per unit). The impact of these prayers of signing of EPA at preferential rate shouldn't be passed on to the consumers and hence the prayers made should be rejected.
5. LWEPL filed Miscellaneous Application (MA) No. 38 of 2020 dated 23 May, 2020 and made the following submission:
- 5.1. The present MA ought to be read as part and parcel of the Petition.
- 5.2. While the present Petition is pending adjudication before the Commission, on 23 May 2020, MSEDCL has issued an e-mail to LWEPL directing disconnection of LWEPL's WTGs (connected to the Kaudgaon PSS) in view of the directions issued by Maharashtra State Load Despatch Centre (MSLDC) in its letter dated 2 May 2020 and on account of grid security reasons. MSEDCL has, inter alia, identified LWEPL's WTGs which are the subject matter of the present dispute (5.6 MW) for the purpose of disconnection
- 5.3. The fundamental premise on which MSLDC/ MSEDCL is seeking disconnection is that there exists no express contract between the LWEPL and MSEDCL and hence these WTG's need to be disconnected from the grid to maintain grid stability. MSEDCL/ MSLDC's rationale is flawed both in fact and law, as there is an implied contract which exists between the parties. It is settled principle of law that express and implied contracts are to be treated at par. Once the contractual relationship is established between MSEDCL and LWEPL (RE generator), then the principle of 'Must Run' must be honoured even in the present situation (due to outbreak of COVID-19). This position is further established by the Ministry of New and Renewable Energy's (MNRE) Office Memorandums dated 1 April 2020 and 4 April 2020. Further, LWEPL cannot be treated differently than those generators who have an express contract in place. LWEPL cannot be treated at par with generators who are injecting power into the grid after the expiry of their contracts.
- 5.4. The dispute qua the existence of a contractual relationship between parties is pending adjudication before the Commission. During the pendency of the Petition, MSEDCL/ MSLDC wants to unlawfully disconnect the WTGs, thereby intending to make the present Petition infructuous. This is not permissible in law and is an attempt on behalf of MSEDCL to oust the jurisdiction of the Commission. MSEDCL is also aware that in a similar matter i.e. Petition No. 28 of 2020 titled as Bothe Windfarm Development Private Limited (BWDPL) v. MSEDCL & Ors., the Commission has passed an Interim Order

dated 27 January 2020, directing MSEDCL not to disconnect or take any coercive action against BWPDL's WTGs and to maintain status quo pending the adjudication of Case No. 28 of 2020. The issues to be adjudicated in the present Petition are similar to those which are under adjudication in Petition No. 28 of 2020.

5.5. MSEDCL's attempt to disconnect LWEPL's WTGs is nothing but an attempt to renege on its contractual relationship/ obligations and oust the jurisdiction of the Commission for adjudicating the dispute pending the present proceedings.

5.6. MSEDCL is now seeking to take advantage of the present pandemic to renege on its contractual relationship. It is pertinent to note that wind generators have been granted 'Must Run' status [Regulation 5.2(u) of Indian Electricity Grid Code (IEGC) read with Regulation 11.1 of RE Tariff Regulations 2010] by law. As a consequence, wind generation cannot be unilaterally/ arbitrarily curtailed and/ or the wind generators cannot be disconnected from the grid. In this regard, it is pertinent to note that:-

(a) On 1 April 2020, MNRE issued an Office Memorandum (OM) clarifying that RE generators have been granted 'Must Run' status and this status shall remain unchanged during the COVID-19 related lockdown.

(b) On 4 April 2020, MNRE issued another OM reiterating that RE generation remains 'Must Run' during the present lockdown. The said OM further states that where RE curtailment is on account of any reason other than grid safety reasons, then the same will amount to deemed generation.

5.7. It is evident from the facts of the case, a completely arbitrary and discriminatory treatment is sought to be meted out to LWEPL. The contractual obligations and the State directives are now sought to be reneged under the garb of threat to grid security, which has not been established. This is legally impermissible and such an arbitrary attempt by MSEDCL to deny its dues ought to be strictly dealt with.

5.8. LWEPL made the following key prayers in its MA dated 23 May 2020:

(a) Pass an ex-parte ad interim order staying the operation of MSEDCL's Disconnection Notice/ e-mails dated 22.05.2020 and 23.05.2020 (Annexure A) pending final adjudication of the present Petition;

(b) Pass an ex-parte ad interim order directing MSEDCL and MSLDC to refrain from disconnecting or taking any coercive action against the Petitioner's duly

commissioned WTGs aggregating 5.6 MW, pending final adjudication of the present Petition;

(c) Pass an ex-parte ad interim order directing MSEDCL and MSLDC to maintain status quo qua the Petitioner's duly commissioned WTGs aggregating 5.6 MW, pending final adjudication of the present Petition;

6. LWEPL, in its Rejoinder dated 1 June 2020 has submitted para wise reply to MSEDCL's submission dated 28 April 2020. LWEPL has reiterated its earlier submission except some new additional facts/information which is summarised below:

6.1. Regarding MSEDCL's submission that it is under no obligation to execute EPAs, and that the Commission does not have the jurisdiction to adjudicate the present issue, it is submitted that MSEDCL's submissions are meritless and ought to be rejected by the Commission. The present Petition is filed to seek:-

(a) Honouring of MSEDCL's promise of executing EPAs with LWEPL as set out in its Wind Policy, 2014 and in terms of the mandate of the GoM as set out in the RE Policy, 2015.

(b) MSEDCL, since the date of commissioning accounted for the power generated by the LWEPL's seven WTGs towards meeting its RPO targets, without payment of preferential tariff to LWEPL. In fact, MSEDCL has recovered the cost of such power from the consumers of Maharashtra.

6.2. On 22 February 2015, MSEDCL filed an Affidavit before the Commission, clearly stating that it is executing EPAs, at preferential tariff, with all renewable (non-solar) power projects commissioned in FY 2014-15 and expected 400 MW of wind power capacity to be commissioned during the said period. From public records (available on MEDA's website), only 364.15 MW of wind power capacity was commissioned during FY 2014-15. The wind power capacity commissioned during FY 2014-15 was insufficient to meet MSEDCL's RPO targets. Further, LWEPL's seven WTGs fall within this capacity of 364.15 MW commissioned during FY 2014-15.

6.3. MSEDCL has accounted for power generated from the LWEPL's seven WTGs towards meeting its RPO compliance and has undertaken Joint Meter Readings/ issued Credit Notes. It is clear that an implied contract is already in existence between MSEDCL and LWEPL. The present Petition is merely seeking to formalise the said arrangement by execution of EPA/ PPAs. It is incorrect on the part of MSEDCL to contend that there is no valid contract between the parties.

- 6.4. MSEDCL's contentions that there is no EPA/ PPA in existence between MSEDCL and LWEPL is incorrect and contrary to law. Mere lack of a written contract does not render the implied agreement between the parties illegal. MSEDCL's contention that the Commission lacks the jurisdiction to adjudicate the issues raised in the present Petition is meritless and contrary to law. In any case, the law does not require the pre-existence of either an implied or express contract between a licensee and a generator in order to invoke the adjudicatory powers of the Commission under Section 86 of the Electricity Act.
- 6.5. Once LWEPL has complied with all the necessary requirements of the MSEDCL Wind Policy, 2014 as well as the RE Policy 2015, and an implied agreement is in existence between the parties, execution of a formal EPA is consequential and a mere formality. Hence, MSEDCL's contention that it cannot be compelled to execute EPAs for the seven WTGs is absolutely incorrect in light of the fact that an implied agreement is already in place between MSEDCL and LWEPL, the express promises made by MSEDCL in its Wind Policy 2014 and the mandate of the RE Policy 2015.
- 6.6. The present Petition has been filed, inter alia, seeking directions against MSEDCL to give effect to the Policies of the State of Maharashtra. MSEDCL cannot claim to have discretion in the matter of EPA execution after the State Policy categorically provides that MSEDCL shall mandatorily execute EPAs with wind developers for the capacity identified in the RE Policy 2015. As long as a wind developer has met the requirements of the RE Policy 2015, formal EPA executions were to follow as a consequence.
- 6.7. Having taken benefit of the power generated and supplied by LWEPL, MSEDCL is duty bound to make payments for such supply of electricity which was done non-gratuitously. It is settled law that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to compensate the former in respect of, or to restore, the things so done or delivered.
- 6.8. MSEDCL has submitted that the Commission has time and again held that generators cannot inject power into the grid in the absence of a valid EPA. It is stated that these submissions are not applicable in the peculiar facts of the present case. The Judgments/ Orders cited by MSEDCL are clearly distinguishable on facts and hence not applicable in the present case.
- 6.9. It is settled law that the ratio of any judicial decision must be understood in the background of the facts of that case. A case is only an authority for what it actually decides and not what logically follows from it. The ratio decidendi has to be ascertained by an analysis of

the facts of the case. [Ref: *Ambica Quarry Works v. State of Gujarat & Ors.*: (1987) 1 SCC 213 and *Arasmeta Captive Power Company Private Limited and Anr v. Lafarge India Private Limited*: (2013) 15 SCC 414].

6.10. As regards the Gopani and the GIE case, it is submitted that:

- (a) The facts of the Gopani Case, GIE Case and UMPPL Case are completely different from that of the present matter.
- (b) In the Gopani Case, the petitioner therein (i.e. Gopani) had sought execution of EPAs with MSEDCL on the basis of the Commission's CPP Order dated 08.09.2004 and quashing of MSEDCL's letter terminating the prior contractual agreement between the parties. Further, Gopani was not a wind developer.
- (c) The GIE Case largely pertains to denial of Open Access by MSEDCL and withdrawal of MSEDCL's offer to execute a long-term contract with the petitioner therein (i.e. GIE).

Neither of the above two cases referred by MSEDCL dealt with the promises made by MSEDCL in its Wind Policy 2014 and the Government of Maharashtra's RE Policy 2015. Further, in neither case was there an implied contract between MSEDCL and the petitioner (Gopani and GIE as the case may be) whereby MSEDCL was utilising the power generated by the said Petitioner towards meeting its RPO compliance

6.11. The various Cases have been referred by MSEDCL (viz. Gopani, GIE and UMPPL). In the Gopani Case, it had sought execution of EPAs with MSEDCL on the basis of the Commission's CPP Order dated 8 September 2004, Gopani was not wind generator. The GIE Case largely pertains to denial of Open Access by MSEDCL and withdrawal of MSEDCL's offer to execute a long-term contract. Neither of two cases referred by MSEDCL dealt with the promises made by MSEDCL in its Wind Tariff Policy 2014 and RE Policy,2015. In UMPPL's Case, UMPPL's wind power projects are not entitled to preferential tariff as the said Projects were not commissioned. Further, the MEDA Registration granted to UMPPL was conditional as there were certain micro siting issues. However, LWEPL's seven WTGs have been granted unconditional registration by MEDA commissioned in November 2014. Hence, LWEPL is entitled to preferential tariff determined by the Commission in its Generic Tariff Order dated 7 July 2014.

6.12. LWEPL's Project was conceived and implemented in FY 2013-14-15. LWEPL's seven WTGs are governed by the Commission's RE Tariff Regulations 2010 and the Generic Tariff Order dated 7 July 2014. The tariff determined by the Commission vide the Generic

Tariff Order dated 7 July 2014 is based on the norms/ principles relating to capital expenditure and RoE in terms of the principles set out in the RE Tariff Regulations 2010. The tariff determined by the Commission is premised upon the technology deployed by the developer and the operational efficiencies achieved by the WTGs. Technology has improved over the years resulting in higher operational efficiencies leading to lower capital costs and consequential determination/ discovery of reduced tariffs. It is unreasonable to expect LWEPL to participate in a bid and compete with other developers in FY 2020-21 given that the WTGs have been commissioned in FY 2014-15 (based on the then prevailing technology and capital cost).

- 6.13. As regards, participating in competitive bidding, LWEPL's Project was conceived and implemented in FY 2013-14 and FY 2014-15, qualified to receive the benefit of EPA execution as mandated under the RE Policy 2015. LWEPL is entitled to a generic preferential levelized tariff of Rs. 5.70 per unit.
- 6.14. After commissioning its seven WTGs on 5 November 2014 LWEPL immediately approached MSEDCL requesting EPA execution. However, MSEDCL did not accede to the request for EPA execution at that point in time, despite repeated follow-ups thereby compelling the LWEPL to seek the benefit of the RE Policy 2015. The RE Policy 2015 for the first time required LWEPL to get its WTGs registered with MEDA prior to EPA execution with MSEDCL. LWEPL made the requisite application to MEDA for WTG registration on 26 February 2016. However, due to inordinate delays on the part of MEDA, the registration for the seven WTGs came through only on 25 November 2019 i.e. after a delay of more than 3 years.
- 6.15. MSEDCL has stated that its wind power policy of 3 June 2014 was kept in abeyance on 12 February 2015 (w.e.f 6 February 2015). This does not impact the entitlement of LWEPL's 5.6 MW capacity which was commissioned in November, 2014, i.e. prior to this policy being kept in abeyance. MSEDCL itself issued clarification on 26 September 2014 that no registration/clearance will be required from MEDA for commissioning of wind turbines.
- 6.16. Regarding MSEDCL's submission that granting the reliefs sought for by LWEPL will result in cost of expensive power being passed on to consumers, EA enjoins upon the Commission to promote generation of electricity from new and renewable sources [Section 86(1)(e)]. Section 61 casts a mandatory obligation on the Commission to ensure that generation and distribution of electricity are conducted on commercial principles and safeguarding consumers' interest at the same time ensuring recovery of the cost of electricity in a reasonable manner. EA requires State Commissions to balance the interests of all stakeholders. Forcing LWEPL to participate in a competitive bid will be against

sound commercial principles as it will result in financial losses to LWEPL. Consumer interest would be served by ensuring that a national asset (seven WTGs of LWEPL) is not left stranded.

7. LWEPL filed addendum to its Petition dated 1 June, 2020 which are summarized below:

7.1. Despite the pendency of the MA before the Commission and despite the specific request made by LWEPL to MSEDCL not to disconnect/ shut-off the WTGs till final adjudication of the Petition, on 31 May 2020 (i.e. Sunday), MSEDCL has unilaterally and illegally disconnected/ shut-off the LWEPL's WTGs connected to the 220 kV Jeur-Khandke (Kaudgaon) Pooling Sub-Station (Kaudgaon PSS).

7.2. It may be noted that MSEDCL has disconnected the WTGs despite the fact that the Petition has been listed for hearing by the Commission on 3 June 2020. A notice in this regard was issued by the Commission (by e-mail) on 27 May 2020. MSEDCL was fully aware that the Petition and the LWEPL's M.A. No. 38/2020 are listed for hearing before the Commission on 3 May 2020. However, in an act that clearly amounts to an overreach, MSEDCL has intentionally disconnected the WTGs in order to render LWEPL's M.A. No. 38/2020 infructuous. MSEDCL's actions are contrary to judicial propriety.

7.3. The fundamental premise on which MSEDCL has disconnected LWEPL's WTGs (on instructions of MSLDC) is that there exists no express contract between LWEPL and MSEDCL and hence these WTG's need to be disconnected from the grid to maintain grid stability. This disconnection has taken place when the same issue between the parties is pending adjudication before the Commission. In this regard, it is also pertinent to note that in a similar matter being Case No. 28 of 2020 titled as BWDPL v. MSEDCL & Ors., the Commission had vide its Order dated 27 January 2020 directed MSEDCL to refrain from disconnecting the WTGs/ taking any coercive action against Bothe pending adjudication of the matter. MSEDCL/ MSLDC's rationale for disconnection is flawed both in fact and law, as there is an implied contract which exists between the parties. It is settled principle of law that express and implied contracts are to be treated at par. Once the contractual relationship is established between MSEDCL and the LWEPL (RE generator), then the principle of 'Must Run' must be honoured even in the present situation (due to outbreak of COVID-19).

7.4. Given the fact that MSEDCL has already disconnected/ shut-off the WTGs, LWEPL is constrained to move the present MA seeking the following addition/amendments to the Prayers after Prayer (c) of the main Petition:

(d) Quash the disconnection notice/ e-mails dated 22.05.2020 and 23.05.2020 issued by MSEDCL to the Petitioner qua disconnection of the Petitioner's WTGs;

(e) Direct the Respondents (MSEDCL and MSLDC) to forthwith re-start the WTGs of the Petitioners/ permit the Petitioner to re-start its WTGs which have been disconnected/ shut-off by MSEDCL pursuant to its disconnection notice/ e-mails dated 22.05.2020 and 23.05.2020.

(f) Direct MSEDCL to compensate the Petitioner for deemed generation, for the period of disconnection of the Petitioner's WTGs.

(g) Ad-interim/ interim relief in terms of prayer (e) above.

8. MEDA in its reply dated 2 June 2020 has stated that:

8.1. Details regarding 5.6 MW Wind Power projects of LWEPL are as below:

Sr. No.	Project Location	Infrastructure Clearance	Commissioning Date & Letter	Application for Registration	Project Registered on	Remark
1.	Gat No. 26 of village – Devgaon, Tal.- Dist- Ahmednagar, (Location:- A11, Site- Khandke)	Not Given	05.11.201, SE/ANRC/ TECH/ Vish Wind LLP/DYEE AMR/1738 0, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/ A11, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3917, dated 25.11.2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No. Apau-2016/pr.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pr.kra.49/urja-7, dated 20.07.2015
2.	Gat No. 30 of village – Devgaon, Tal.- Dist- Ahmednagar, (Location No. A12, Site- Khandke)	Not Given	05.11.201, SE/ANRC/ TECH/ Vish Wind LLP/DYEE AMR/1738 0, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/ A12, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3916, dated 25.11.2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No. Apau-2016/pr.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No.

						Apau2015/pra.kra.49/urja-7, dated 20.07.2015
3.	Gat No. 186 of village – Ratadgaon, Tal.-Dist-Ahmednagar, (Location No. A26, Site-Khandke)	Not Given	05.11.201, SE/ANRC/TECH/Vis h Wind LLP/DYEE AMR/1737 9, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/30, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3915, dated 25.11.2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No. Apau-2016/pra.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pra.kra.49/urja-7, dated 20.07.2015
4.	Gat No. 185 of village – Ratadgaon, Tal.-Dist-Ahmednagar, (Location No. A27, Site-Khandke)	Not Given	05.11.201, SE/ANRC/TECH/Vis h Wind LLP/DYEE AMR/1737 9, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/31, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3913, dated 25.11.2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No. Apau-2016/pra.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pra.kra.49/urja-7, dated 20.07.2015
5.	Gat No. 445/B of village – Agadgaon, Tal.-Dist-Ahmednagar, (Location No. N33, Site-Khandke (Jeur))	Not Given	05.11.201, SE/ANRC/TECH/Vis h Wind LLP/DYEE AMR/1738 1, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/N33, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3914, dated 25.11.2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No. Apau-2016/pra.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pra.kra.49/urja-7, dated 20.07.2015

6.	Gat No. 118 of village – Agadgaon Tal.-Dist-Ahmednagar, (Location No. N27, Site-Khandke)	Not Given	05.11.201, SE/ANRC/TECH/Vis h Wind LLP/DYEE AMR/1738 1, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/ N27, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3912, dated 25.11.2019	<ul style="list-style-type: none"> • This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. • This project registered as per GR No. Apau-2016/pr.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pr.kra.49/urja-7, dated 20.07.2015
7.	Gat No. 159/1 of village – Ratadgaon, Tal.-Dist-Ahmednagar, (Location No. N22, Site-Khandke)	Not Given	05.11.201, SE/ANRC/TECH/Vis h Wind LLP/DYEE AMR/1737 8, dated 21.11.2014	LWEPL/ME DA/VWILL P/Khandke/ N22, dated 25.02.2016	PGN-1/PRL/Lalpur/0.80MW /2019-20/3910, dated 25.11.2019	<ul style="list-style-type: none"> • This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. • This project registered as per GR No. Apau-2016/pr.kra.251/urja-7, dated 21.12.2016 under 1500MW capacity under Renewable Energy Policy G.R. No. Apau2015/pr.kra.49/urja-7, dated 20.07.2015

8.2. WTGs of 5.6 MW capacity were commissioned on 5 November 2014. The agreement for such commissioning is best known to the parties. MEDA is not aware of terms of the agreement. MEDA has not issued Infrastructure clearance and Commissioning Clearance to the projects.

8.3. GoM issued GR Apau2016/Pra.Kra.251/Urja-7 on 21 December 2016 for regularization and registration of directly commissioned wind projects by MSEDCL.

8.4. MEDA has registered Wind Projects of LWEPL on 25 November 2019 as per GoM methodology GR dated 09.09.2015 after government regularized through Govt. Resolution dated 21 December 2016.

9. At the e-hearing through video conferencing held on 3 June 2020, the Advocate of LWEPL reiterated its submissions in the Petition, its Rejoinder to MSEDCL's reply and MA. The Advocate of MSEDCL reiterated its submissions in its reply. In reply to some clarification sought by the Commission, the representative of MEDA sought some time to submit its reply. The Commission granted five days' time MEDA and MSLDC to submit its submission with

copy to other parties. The Commission granted three days time thereafter to other parties to file their submission, if any.

10. MSLDC, in its reply dated 9 June 2020 has stated as below:

10.1. Being the System Operator for the State of Maharashtra, MSLDC has to ensure adherence to Regulations & Orders issued by the Commission. Recently, the Commission has notified 'MERC (Forecasting, Scheduling and Deviation Settlement for Solar and Wind Generation) Regulations, 2018' on 20 July 2018 and same is commercially implemented from 6 January 2020 in the Maharashtra State. This Regulation is applicable to LWEPL and should abide the Scheduling and Despatch Code and DSM Procedure approved by the Commission.

10.2. As per Regulation No. 5.14 of the MERC (F&S) Regulations 2018, no Wind & Solar energy shall be considered for despatch by the SLDC if it is not scheduled by the QCA on behalf of the Generators. Accordingly, as per the Clause No. 6.3 of the amended F&S Procedure dated 19 December 2019 prepared by MSLDC and approved by the Commission, MSLDC is collecting PSS-wise details of power contracted by Discoms and their embedded consumers from various Discoms in the State on monthly basis. Based on the information, PSS-wise power is scheduled to respective Discoms based on the quantum received.

10.3. On analyzing the information for the month of May 2020, it is observed that out of total capacity of 6305 MW considered under F&S Regulations, contract details are available only for 5124 MW capacity while the contract details for 1181 MW capacity are not available.

10.4. Hence, if non-contracted capacity (1103MW) is still connected to the grid then there may be additional injection of around 750 MW to the scheduled power. This shall create heavy mismatch at State periphery and also create issues in real time operations during peak injection scenario. This unscheduled and non contracted RE penetration shall hamper grid stability and reliability.

10.5. In view of above, vide letter no.723 dated 2 May 2020, MSLDC has intimated the list of PSS with quantum having mismatch in the contracted capacity and requested to confirm whether the said capacity of 1181 MW is connected to the grid or disconnected and ensure disconnection under intimation to this office prior to the commencement of high wind season.

11. MEDA in its additional submission dated 8 June 2020 has stated that:

11.1. MEDA has provided details of major events took place from the date of application made by LWEPL for registration till the date on which registration was granted as under:

SNo.	Major Event	Date	Remark
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1.	<p>Application for Registration</p> <p>1. Gat No. 26 of village – Devgaon, Tal.-Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>2. Gat No. 30 of village – Devgaon, Tal.-Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>3. Gat No. 445/B of village – Agadgaon, Tal.- Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>4. Gat No. 185 of village – Ratadgaon, Tal.- Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>5. Gat No. 186 of village – Ratadgaon, Tal.- Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>6. Gat No. 118 of village – Agadgaon Tal.-Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p> <p>7. Gat No. 159/1 of village – Ratadgaon, Tal.- Dist- Ahmednagar, 0.8 MW (1x0.80kW) Capacity</p>	26.02.2016	<p>1. LWEPL/MEDA.VWILLP/Khandke/A11</p> <p>2. LWEPL/MEDA.VWILLP/Khandke/A12</p> <p>3. LWEPL/MEDA.VWILLP/Khandke/N33</p> <p>4. LWEPL/MEDA.VWILLP/Khandke/31</p> <p>5. LWEPL/MEDA.VWILLP/Khandke/30</p> <p>6. LWEPL/MEDA.VWILLP/Khandke/N27</p> <p>7. LWEPL/MEDA.VWILLP/Khandke/N22</p>
2	GoM had issued G.R. No. Apau2016/Pra.Kra251/Urja-7	21.12.2016	GoM had issued G.R. for regularization and registration of directly commissioned wind projects by MSEDCL
3	Site Inspection fee receipt date	06.01.2017	<p>1. VWILLP/LWEPL/16-17/08</p> <p>2. VWILLP/LWEPL/16-17/16</p> <p>3. VWILLP/LWEPL/16-17/03</p> <p>4. VWILLP/LWEPL/16-17/10</p> <p>5. VWILLP/LWEPL/16-17/09</p> <p>6. VWILLP/LWEPL/16-17/17</p> <p>7. VWILLP/LWEPL/16-17/18</p>
4	Micrositing inspection of Project – 1,2,3,6 and 7	03.02.2017	Project were found to be following micrositing guidelines.

			Inspection of projects no. 4 & 5 was held up because of Right of the way problem & direction of wind turbines.
5	Micrositing inspection of Project 4 & 5	27.05.2017	Project were found to be following micrositing guidelines.
6	Scrutiny committee meeting	23.06.2017	Recommended projects for Registration.
7	Projects file were sent for approval of the GoM	10.08.2017	-----
8	Files received date	11.05.2018	GoM had ordered to re-inspect the projects for verifying Micrositing guidelines
9	Micrositing Re-inspection	03.08.2018	Projects found to be following micrositing guidelines
10	Scrutiny committee meeting	20.08.2018	Projects recommended for registration
11	Projects file were sent for approval of GoM	7.09.2018	-----
12	Approved files received from GoM	19.08.2019	-----
13	Registration issued	25.11.2019	Project Registration issued

12. LWEPL in its additional submission dated 17 June 2020 (in reply to the issues argued by MSEDCL during the Hearing and on the additional submission made by MEDA on 8 June 2020) made following submission:

12.1. MSEDCL on 3 June 2020 has argued on following points:

- i. MSEDCL is under no obligation to enter into an EPA with any party. MSEDCL has not consented to executing EPA with LWEPL.
- ii. There is no implied agreement/ implied arrangement between MSEDCL and LWEPL. The implied agreement/ arrangement between LWEPL and MSEDCL is contrary to the Indian Contract Act, 1827, and is void.
- iii. Credit Notes issued by MSEDCL to LWEPL is misplaced. The said Credit Notes clearly state that they are subject to issuance of NOC/ EPA execution.
- iv. MSEDCL had requested the Commission to consider contracted generation of RE and not actual RE injected into the grid towards meeting its RPO targets

- v. LWEPL cannot rely upon both the Wind Policy 2014 and the RE Policy 2015. The Wind Policy 2014 does not bind MSEDCL to execute EPAs with LWEPL. Neither the Wind Policy 2015 nor the Methodology dated 9 September 2015 guarantees EPA execution with MSEDCL.
- vi. The MEDA registration granted to LWEPL is conditional upon LWEPL abiding by all the policies, orders and directions of the GoM and the Commission.
- vii. Since December 2017 MSEDCL is procuring power through competitive bidding and no further EPAs have been signed at preferential tariff.
- viii. Granting the reliefs sought for by LWEPL will result in cost of expensive power being passed on to consumers.

12.2. Regarding executing formal EPA, the GoM and MSEDCL have issued various policy decisions aimed at increasing the non-Solar RE capacity addition in Maharashtra by inviting private investors to set up RE Projects. The primary reason for inviting developers to invest in non-solar RE generation in the State of Maharashtra was to enable MSEDCL to meet its non-Solar RPO targets which it was failing to meet. These policies incentivized development of RE capacity in Maharashtra, amongst others, by making a promise to developers that MSEDCL shall execute EPAs with RE developers who setup their projects in Maharashtra. The capacity of 2000 MW envisaged under the RE Policy 2008 was exhausted some time in FY 2013-14 the capacity addition in Maharashtra in lieu of the RE Policy 2008 was not sufficient to meet MSEDCL's RPO targets. Hence, in order to meet its RPO targets by taking benefit of the wind capacity commissioned in Maharashtra after the expiry of the RE Policy 2008, on 3 June 2014, MSEDCL issued the Wind Policy 2014 in which MSEDCL made a promise to wind developers that it would, execute EPAs with wind developers for projects commissioning in FY 2014-15 (and onwards) in chronological order on the basis of date of commissioning of WTGs, for capacity to be declared/ identified by the GoM.

12.3. Subsequently, on 26 September 2014 MSEDCL issued a Clarification to its Wind Policy 2014 which stated that it intends to proceed with the Wind Policy 2014 and that no MEDA Infrastructure Clearance is required. However, MSEDCL did not execute EPAs with LWEPL at that point in time. LWEPL's WTGs were commissioned in November, 2014 i.e. during the period that is saved by Clause 2.5 of the RE Policy 2015. Hence, LWEPL's seven WTGs fall within the 1500 MW capacity earmarked under the RE Policy 2015 for mandatory tie up with MSEDCL because these WTGs were commissioned by MSEDCL for the purpose of supplying power to MSEDCL and included in the procurement target of MSEDCL for RPO.

12.4. As MSEDCL had not executed EPAs with LWEPL's seven WTGs at the time of their commissioning, LWEPL was left with no choice but to seek registration of its seven WTGs with MEDA under RE Policy 2015. Accordingly, on 26 February 2016 LWEPL submitted its application to MEDA seeking registration of its WTGs. The MEDA Registration for LWEPL's seven WTGs came through only on 25 November 2019 i.e. after an inordinate delay of more than three years. The delay in grant of registration by MEDA was not on account of any delays by LWEPL as is evident from MEDA's Submission dated 9 June 2020. On a conjoint reading of the Wind Policy 2014 and the RE Policy 2015 it is evident that MSEDCL is duty bound to execute formal EPAs with LWEPL for its seven WTGs, the issue of MSEDCL's Wind Policy 2014 being kept in abeyance and its impact on LWEPL's entitlement to execute EPAs is immaterial. Having not executed EPAs with LWEPL at the time of commissioning of the seven WTGs i.e. in November, 2014, MSEDCL cannot now contend that on account of the Wind Policy 2014 being kept in abeyance subsequently with effect from 6 February 2015, it is under no obligation to execute EPAs with LWEPL. MSEDCL cannot seek to benefit from its own inactions and defaults.

12.5. MSEDCL has retrospectively executed EPAs with various wind developers, including LWEPL for 31.2 MW WTGs, whose WTGs have been commissioned during FY 2014-15 around the same time as these seven WTGs. These WTGs have been commissioned under the aegis of MSEDCL's Wind Policy 2014, on the basis of Commissioning Certificates issued by MSEDCL and are registered under the RE Policy 2015 in the year 2017. Hence, MSEDCL cannot now contend that its Wind Policy 2014 has been kept in abeyance, especially since MSEDCL and various wind generators have acted upon MSEDCL's Wind Policy 2014. MSEDCL's contention that the Wind Policy 2014 and the RE Policy 2015 have to be construed independently will cause violence to the express terms of the said policies thereby rendering them otiose/ unimplementable.

12.6. As regards argument of no implied contract, LWEPL has supplied power to MSEDCL from the date of commissioning of its WTGs which has been utilized by MSEDCL towards meeting its RPO targets for FY 2014-15 to FY 2019-20. MSEDCL has undertaken Joint Meter Readings/ issued Credit Notes to LWEPL for the period FY 2014-15 to December 2018. The Credit Notes record the energy supplied by LWEPL to MSEDCL over the years. This clearly establishes that an implied contract is already in existence between LWEPL and MSEDCL for the seven WTGs. It is now a question of mere formality to reduce the said implied agreement to writing. Hence, a legal right has accrued in favour of LWEPL to seek directions against MSEDCL to formalise the implied agreement between the parties by executing EPAs for the seven WTGs.

12.7. It is an admitted fact that MSEDCL (as a matter of practice) delays EPA execution although it takes the benefit of power supply from a wind developer. MSEDCL generally executes EPAs belatedly with retrospective effect. In the case of LWEPL's other WTGs which were commissioned during the period June, 2014 to November, 2014 (i.e. 31.2 MW capacity WTGs), LWEPL had supplied power to MSEDCL from the date of commissioning of these WTGs. MSEDCL executed formal EPAs for these WTGs only in March, 2017 to August 2017 i.e. after a period of almost three years. The Credit Notes issued by MSEDCL enable it to make payments retrospectively (for the power supplied by wind developers till the time formal written contracts are executed) once the EPAs are executed. Hence, MSEDCL's contention that the Credit Notes are merely a means of keeping record is incorrect. By arguing that the implied agreement between the parties is void, MSEDCL has in effect agreed that an implied agreement is in existence between the parties which has now become void.

12.8. Section 10 of the Contract Act provides that all agreements are contracts if they are made with the free consent of the parties, for a lawful consideration and with a lawful object. The following elements required to constitute a valid contract are:

- i. The implied agreement between MSEDCL and LWEPL is borne out of their free will and consent. Since November 2014 until May, 2020, MSEDCL has never intimated to LWEPL, either expressly or by conduct, that it does not accept or does not wish to accept the power supplied by LWEPL. Contrary to the same, MSEDCL has in fact accepted the power supplied by LWEPL, considered it towards meeting its RPO targets and in lieu thereof has undertaken Joint Meter Readings/ issued Credit Notes to LWEPL.
- ii. The implied contract between the parties is for a lawful object i.e MSEDCL's RPO compliance, and for a lawful consideration – preferential tariff determined by the Commission vide its Generic Tariff Order dated 7 July 2014. This is also evident from Clause 2.1 and 2.5 of the RE Policy 2015 read with MEDA's response to the RTI query dated 9 January 2020.
- iii. The implied agreement is not expressly declared to be void by any law, especially since neither the Electricity Act nor the Rules/ Regulations prohibit implied contracts/ agreements between generating companies/ distribution licensees.

12.9. In terms of Section 10 of the Contract Act, all contracts that are statutorily required to be in writing cannot be implied. In order to establish that a contract is hit by the bar of Section 10 of the Contract Act, it needs to be demonstrated that the statute mandates written contracts and explicitly ousts implied contracts. Contrary to MSEDCL's submissions, the Electricity Act nowhere states that generation and sale of electricity has to take place on

the basis of a “written/ express” power purchase agreement and that implied power purchase agreements are illegal. the Hon’ble Supreme Court in *All India Power Engineer Federation v. Sasan Power Limited* reported as (2017) 1 SCC 487 has held that the Contract Act is applicable to statutory contracts as well.

12.10. The contention of MSEDCL that prior approval of the Commission is required for generation and sale of power by a generator to a distribution licensee. MSEDCL has failed to point out that in the context of Feed-In-Tariff projects like LWEPLs no written approval of the Commission is required. EPAs executed between wind developers and MSEDCL that are based on Generic Tariff Orders passed by the Commission are not approved by the Commission. Hence, MSEDCL’s contention that lack of a written power purchase agreement approved by the Commission invalidates the implied agreement between the parties is incorrect and contrary to law. The Hon’ble Supreme Court through a catena of cases has settled the law related to implied contracts:

- i) *Coffee Board, Karnataka v. Commissioned of Commercial Taxes, Karnataka & Ors.* reported as (1988) 3 SCC 263,
- ii) *Bhagwati Prasad Pawan Kumar v. Union of India* reported as (2006) 5 SCC 311,
- iii) *Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd.* reported as (2008) 1 SCC 503
- iv) *Haji Mohd. Ishaq v. Mohd. Iqbal and Mohd. Ali & Co.* reported as (1978) 2 SCC 483.

12.11. From the above law laid down by the SC, it is clear that if a party has accepted supply of goods/ an offer without any reservations/ demur or has never objected to such supply and has in fact enjoyed the benefit resulting from such supply of goods, then such a party is said to have entered into a contract impliedly. MSEDCL has never objected once to supply of power by LWEPL from its seven WTGs, has enjoyed such power supply by considering it towards meeting its RPO compliance and has undertaken Joint Meter Readings and issued Credit Notes to LWEPL in lieu of such power supply. Hence, by its conduct MSEDCL has accepted the power supplied by LWEPL and acted upon an implied agreement with LWEPL.

12.12. With regard to delay in grant of registration, MEDA in its submission dated 8 June 2020 has provided details of relevant events took place from the date of application for registration till the date on which registration was granted. The chronology of events is largely accurate but there are certain factual gaps in chronology. It is evident from the

chronology of events, that i) A delay of approximately 10 months due to the fact that MEDA was awaiting the notification of the GR dated 21 December 2016 for processing LWEPL's request for registration of its WTGs which were directly commissioned by MSEDCL and had to be regularized and ii) A procedural delay of approximately 27 months for all seven WTGs in getting final approval from Chairman, MEDA. Hence the registration of LWEPL's seven WTGs was delayed by about three years on account of various procedural issues not attributable to LWEPL.

12.13. MSEDCL has contended that it has sought relief in all RPO proceedings that its RPO compliance ought to be considered on the basis of contracted RE and not actual RE injected into the grid which was allowed by the Commission. This contention of MSEDCL is incorrect and based on a selective reading of the various RPO compliance Orders passed by the Commission. The Commission in RPO verification Orders has held that MSEDCL's RPO compliance will be determined on the basis of actual energy injected into the grid and not on the basis of contracted RE capacity. To that extent, the Commission has considered the revised data submitted by MEDA which is based on the IBSM/ FBSM report furnished by MSLDC which includes the quantum of power injected into to the grid by WTGs with whom MSEDCL does not have written EPAs.

12.14. With regard to participating in a competitive bidding invited by MSEDCL for procurement of power, LWEPL's Project was conceived and implemented in FY 2013-14 and FY 2014-15. The costs incurred by LWEPL for constructing and operating the seven WTGs is keeping in mind the prevailing technologies. Directing LWEPL to participate in a competitive bid is contrary to the RE Policy 2015 which clearly guarantees that wind developers will receive preferential tariff based on their date of commissioning. Since LWEPL's seven WTGs have commissioned in FY 2014-15 and qualify to receive the benefit of EPA execution as mandated under the RE Policy 2015, LWEPL is entitled to a generic levelized preferential tariff of INR 5.70/ kWh in terms of the Commission's Generic Tariff Order dated 7 July 2014. In November, 2014, LWEPL commissioned WTGs aggregating 23.2 MW (under the aegis of MSEDCL's Wind Policy 2014 read with the RE Policy 2015). For this capacity, MSEDCL has executed EPAs in the month of August, 2017 i.e. after the letter dated 17 July 2017 was issued by the GoM. This makes it clear that MSEDCL itself also understood that WTGs which were commissioned in terms of the promise made under the RE Policy 2014 and thereafter registered under the RE Policy 2015 were to be given EPAs despite the decision of the GoM to go for bidding. Hence, once WTGs were registered under the RE Policy 2015, they were entitled to execution of EPAs so long as they fall within the capacity (1500 MW) identified by the GoM in the RE Policy 2015.

- 12.15. The SC in *A.P. Diary Development Corp. Federation v. B. Narasimha Reddy*: (2011) 9 SCC 286 has held that the Government Policy cannot change abruptly, especially retrospectively and to the prejudice of parties who have acted on the basis of an extant Government Policy. If a Government Policy has been implemented, and is not struck down as unconstitutional, then the said Policy has to be given effect to in entirety. Any decision taken by the Government that is contrary to its Policies has to be read down/ is liable to being quashed.
- 12.16. The SC in a catena of Judgments has held that if based on a Government Representation, a party takes a position then the said party has the legitimate right to seek enforcement of the said representation. Some of the Hon'ble Supreme Court's Judgments relied upon for this purpose are (a) *Delhi Cloth and General Mills Limited v. Union of India* [(1988) 1 SCC 86], (b) *Monnet Ispat and Energy Limited v. Union of India* [(2012) 11 SCC 1], (c) *Punjab Communications Limited v. Union of India* [(1999) 3 SCC 499], (d) *Union of India v. Hindustan Development Corporation and Others* [(1993) 3 SCC 499] and (e) *Ashoka Smokeless Coal India (P) Limited v. Union of India* [(2007) 2 SCC 640].

Commission's Analysis and Ruling:

13. LWEPL has filed this case mainly requesting the Commission to direct MSEDCL for signing of EPA for its 7 WTGs having aggregate capacity of 5.6 MW (commissioned in November 2014) in terms of MSEDCL's Wind Policy 2014 and RE Policy 2015.
14. Out of 50.4 MW capacity Wind Project of LWEPL located in Ahmednagar District of Maharashtra, 45.6 MW was commissioned in phases between March 2014 to November 2014. The remaining capacity of 4.8 MW is yet to be commissioned. The commissioned 45.6 MW includes the disputed capacity of 5.6 MW in the instant Case.
15. Out of its total commissioned capacity of 45.6 MW, EPA for 40 MW was signed between August 2014 to August 2017. EPA for remaining capacity of 5.6 MW has not been signed. Before the RE Policy 2015 came into effect, MSEDCL had already executed EPAs with LWEPL for 8.8 MW capacity. However, MSEDCL did not execute EPAs with LWEPL for the balance capacity of 36.8 MW. Therefore, for the remaining 36.8 MW capacity (which was not tied up prior to the RE Policy 2015) LWEPL was required to register the WTG's with MEDA as a prerequisite for executing EPAs with MSEDCL as per the RE Policy 2015. All signed EPAs were made effective retrospectively i.e. from date of commissioning of the project. LWEPL has contended that its project capacity of 45.6 MW was based on MSEDCL's Wind Policy 2014 which stated that MSEDCL would execute EPAs in chronological order on the basis of date of commissioning of WTGs without any requirement of infrastructure clearance from MEDA. However, upon insistence from MSEDCL for

registration of project with MEDA under GoM's RE Policy 2015, LWEPL applied for registration of its 36.8 MW projects.

16. Registration for 5.6 MW capacity was received on 25 November 2019. MSEDCL has refused to sign the EPA on the ground that since 2017, it has decided to procure power through competitive bidding only. LWEPL is contending that since commissioning of these projects in 2014, MSEDCL is using power generated from these projects and hence now cannot refuse to sign EPA. Whereas, MSEDCL has contended that it has never assured LWEPL about signing of EPA and hence MSEDCL cannot be forced to procure power from these projects at generic tariff which is almost double the tariff being discovered through recent competitive bidding process.
17. Having heard the parties and after taking on record various submissions filed by all the parties, the Commission frames following issues for its consideration in the present matter:
 - a) Whether the then applicable Policies mandate MSEDCL to sign EPA with LWEPL?
 - b) Whether there was an implied contract/agreement between the parties?
 - c) Whether LWEPL is eligible for compensation for energy injected by it into the Grid and if yes, at what rate ?
 - d) Balance of Convenience/equity/Way forward.

The Commission has dealt with all the above issues in the following paragraphs.

18. **Issue: a) Whether the then applicable Policies mandate MSEDCL to sign EPA with LWEPL?**
 - 18.1 LWEPL has contended that it has setup the project based on promise made by MSEDCL in its Wind Policy, 2014 to execute EPAs with wind developers setting up projects in Maharashtra. It has further contended that 5.6 MW disputed capacity is also included in 1350 MW capacity identified within 1500 MW capacity in GoM's RE Policy, 2015 for meeting RPO of MSEDCL. Based on these policies, LWEPL has contended that it is mandatory for MSEDCL to sign EPA for its 5.6 MW balance capacity of 45.6 MW project located in Maharashtra. While opposing this contention of LWEPL, MSEDCL has stated that it has not given any consent for signing EPA hence it is not under any obligation to execute EPA with LWEPL.

- 18.2 To address this issue, the Commission finds it appropriate to summarize the various policies related to Wind generation, applicable at the time of setting-up of these projects. LWEPL has contended that it has setup its project based on MSEDCL's Wind Policy 2014. However, the said Wind Policy was issued on 3 June 2014, whereas the LWEPL's 45.6 MW was commissioned in phases starting from March 2014 till November, 2014 implying thereby that certain part of the total installed capacity of 45.6 MW was commissioned before issuance of MSEDCL's Wind Policy 2014 on 3 June 2014. Therefore, the Commission finds it appropriate and necessary to also include in its analysis, the policy applicable before issuance of MSEDCL's Wind Policy.
- 18.3 Further, the Commission also notes that framing of Policy is a function of the Government. The Government, through Policy document lays down the targets for setting up of RE projects in the State and while doing so it provides some fiscal benefits and removes procedural barriers for incentivizing the stakeholders to achieve the decided/planned targets. Policy also specifies the eligibility criteria for availing such benefits. The policy may also necessitate changes from time to time. The Stakeholders can claim benefits under such policies only if they meet the criteria stipulated in the Policy. Thus, the Policy is required to be followed in full and the provisions cannot be selectively chosen. In the present case, considering the timeframe involved, applicable GoM's policies would be RE Policy 2008 and RE Policy 2015. LWEPL has also relied upon MSEDCL's Wind Policy 2014. Although, the Commission would be analysing all these three documents, in the opinion of the Commission, MSEDCL's Wind Policy 2014 needs to be referred to as circular/document of MSEDCL in its capacity as a Distribution Licensee, communicating its intent of procuring Wind Power and laying down procedural aspect related to the same rather than as a 'Policy' by the Government. As MSEDCL's Wind Policy has not been notified by the Government, in the opinion of the Commission, mere existence of such document would not accrue any legal rights to any party, unless it is specifically granted and/or agreed by the parties involved, which otherwise would be available from the Policy notified by the Government.
- 18.4 Accordingly, the Commission is summarizing below, contents relevant for present matter from the Policies applicable at relevant point of time:
- a. New Policy for Generation of Power from Non-Convectional Sources of Energy 2008 (RE Policy 2008) notified by the GoM on 14 October 2008
 - i. Objective was to setup 2000 MW of Wind Projects
 - ii. If the Investor / Developers wishes to obtain benefits allowable under this policy then, it is obligatory on them to sell 50% electricity from the project to MSEDCL and remaining 50% to any other entity within the State.

- iii. Letter of Infrastructure clearance will be issued to the project by MEDA mentioning all applicable benefits.
- b. Target of 2000 MW specified in RE Policy 2008 was achieved in FY 2013-14. Subsequent to the above mentioned 2008 Policy, the GoM notified its next policy in 2015.
- c. MSEDCL's New Policy for Wind Power Projects issued on 3 June 2014
 - i. MSEDCL shall execute the EPA with wind generators to the tune of capacity in MW to be declared by the GoM and as may be decided by MSEDCL Board considering the fulfilment of Renewable Purchase Obligation target.
 - ii. The EPA shall be executed in chronological order on the basis of date of commissioning of WTGs i.e. EPA of first commissioned project will be signed first.
- d. MSEDCL's clarification to its New Policy for Wind Power projects issued on 26 September 2014:
 - i. No MEDA infrastructure clearance is required for issuing Permission to Commission (PTC)
 - ii. Statutory clearances shall be obtained by generators, only undertaking shall be submitted to MSEDCL
 - iii. MSEDCL will verify the commissioning of the WTG, fulfilment of the formalities for eligibility and issue commissioning certificate.
 - iv. For execution of EPA, generator shall submit commissioning certificate and other documents as per MSEDCL's policy, however, MSEDCL at its discretion will take decision whether or not to enter into EPA with the generator.
- e. Shortly after issuing above clarification, MSEDCL on 12 February 2015, kept its Wind Policy 2014 and subsequent clarification dated 26 September 2014 in abeyance in view of RE Policy being notified at GoM level.
- f. Comprehensive Policy for Grid-connected Power Projects based on New and Renewable (Non-conventional) Energy Sources-2015 (RE Policy, 2015) notified by the GoM on 20 July 2015:

- i. Target to setup 5000 MW wind projects out of which 1500 MW capacity would be developed for meeting procurement requirement of distribution licensees under RPO regime.
- ii. Capacity of about 1350 MW commissioned after the expiry of previous policy [RE Policy 2008] would be included in procurement target of 1500 MW. MERC tariff prevailing at the time of commissioning of respective projects will be applicable for signing the PPAs. However, registration with MEDA will be mandatory for these projects.
- iii. As per provisions of the Electricity Act 2003, matters relating to promotion of RE sources, measures for evacuation arrangement, sale of electricity, percentage of RPO and other related matters are in the domain of the MERC and all Orders in respect of these matters will be applicable to the projects set up under this policy.
- g. Methodology for the Installation of projects will be as covered under the comprehensive policy for grid-connected power projects based on New and Renewable (Non-conventional) Energy Sources, 2015, notified by the GoM on 9 September 2015:
 - i. The wind power projects will be eligible to execute EPA or to seek Open Access or to sell energy through Renewable Energy Certificates (REC) only upon obtaining project registration from MEDA.
 - ii. If all necessary documents are received and the proposal is complete in all respects, the project registration will be done by MEDA after approval of the Chairman MEDA.

18.5 In the background of the above summary of the policy framework applicable at the relevant point of time the Commission notes that total capacity of 45.6 MW was commissioned in phases from March 2014 till November 2014 (project preparation work for which would have started before June 2014). Thus, in the opinion of the Commission, it cannot be accepted that LWEPL has setup its project of 45.6 MW entirely based on MSEDCL's Wind Policy 2014.

18.6 Generation of electricity being delicensed activity under the Electricity Act 2003, any person can setup generating facility by complying with technical standards and the statutory provisions. Such generator is free to use electricity so generated for its self-use or for sale to Distribution Licensee or any other person through Open Access. In case of Renewable energy Generators, since 2010 (including the project in this petition), one more option of Renewable Energy Certificate (REC) mechanism was made available wherein RE generator

can sell brown component of energy at Average Power Purchase Cost (APPC) to Distribution Licensee and earn revenue on the cost of green attribute by selling RECs on the power exchanges.

- 18.7 Further, in the State of Maharashtra, this Commission has been enforcing RPO on Distribution Licensees since 2006, thereby, the Distribution Licensees are mandated to procure certain percentage of its total power procurement from RE sources and/or RECs. LWEPL was aware of all these aspects. The target stipulated in the GoM's RE Policy 2008 was exhausted in the FY 2013-14, MSEDCL's Wind Policy was issued only in June 2014. As certain part of the total installed capacity of 45.6 MW has been commissioned before June 2014, and the entire capacity was installed by November 2014, it would be very well inferred that project related activities for these 45.6 MW would have started before MSEDCL notified its policy in June 2014. Therefore, while setting up of the project, LWEPL must have envisaged all the scenarios of selling electricity and must have taken a business decision before making this investment. The Commission does not accept the contention/representation that LWEPL has setup the project based on promise made by MSEDCL in its RE Policy 2014 since the same is not corroborating with the facts and the sequence of activities of the case as detailed above.
- 18.8 Further, even if it is considered that LWEPL has setup the project based on MSEDCL Wind Policy, then also it is important to note that the said MSEDCL policy was a comprehensive document which had a clause clearly stating that capacity to be procured would be subject to the GoM's decision. As coverage of 2000 MW stated in GoM's RE Policy, 2008 was exhausted in FY 2013-14 itself, MSEDCL's Wind Policy, 2014 issued in June 2014 was in effect not operative till GoM increased coverage beyond 2000 MW. Further, if one goes on the presumption that in future dates, the GoM may increase the coverage beyond 2000 MW, for making any investment decisions, other conditions of RE Policy 2008 which were then applicable need to be considered as it is, including obligation of MSEDCL to procure only 50% of project capacity. It is also important to note that even though MSEDCL's Wind Policy stated that EPA will be signed in chronological order in accordance with date of commissioning, its clarification issued in September 2014 (before commissioning of disputed capacity of 5.6 MW in November 2014), has clearly stated that discretion of signing of EPA would be with MSEDCL. Therefore, MSEDCL's Wind Policy read with its clarification does not give any assurance of signing of EPA to investors.
- 18.9 Subsequently, the RE Policy 2015 was notified by the Government of Maharashtra which has allowed projects of upto 1350 MW, Commissioned post completion of 2000 MW targets under RE Policy 2008, to include in 1500 MW capacity allocated for fulfillment of RPO by 'Distribution Licensees'.

- 18.10 It is important to note that RE Policy 2015 allocated 1500 MW for fulfillment of RPO by 'Distribution Licensees' which included other licensees in the State beside MSEDCL. Therefore, it is also not correct to presume that all 1500 MW capacity needs to be procured by MSEDCL only. LWEPL could also have approached other Distribution Licensees in the State. Further, the said policy mandates registration of projects with MEDA before signing of EPA with Distribution Licensee. Therefore, even if, MSEDCL would have not put its Wind procurement policy in abeyance, due to its interlinking with GoM's decision on capacity to be procured, all provisions of RE Policy 2015 including mandatory provision relating to Registration with MEDA would have become applicable to MSEDCL's 2014 policy. Therefore, it can be safely presumed that the said MSEDCL policy of 2014 was a conditional intent of MSEDCL to procure wind power. This was anyways kept in abeyance by MSEDCL and hence the only policy that would be applicable is RE Policy 2015 of GoM.
- 18.11 The RE Policy amongst other things mandates registration of project with MEDA before signing of EPA and the same needs to be complied with for being eligible for applicability of the provisions under that policy. The generator always had the option of selling its energy under Open Access or opt for REC mechanism.
- 18.12 Once the project developer has decided to take benefit under the Policy, it needs to abide by all the provisions of the policy and also comply with the same in totality. The Project holder does not have the right to question the conditions stipulated under the policy. Thus, the condition of having registration with MEDA is mandatory for LWEPL and hence LWEPL applied to MEDA for registration of WTGs for the cumulative capacity of 36.8 MW. Further, out of this 36.8 MW it had applied for Registration, all the other WTGs barring 7 WTGs of 5.6 MW had received registrations during the period of March 2016 to May 2017. Also, as per the provisions of RE Policy 2015, after receiving the Registration, MSEDCL has signed EPAs for all the capacities at the generic tariff applicable till December 2017. Thereafter all the Wind power procurement is on the basis of the discovered tariff through competitive bidding process.
- 18.13 Registration for balance 7 WTGs of 5.6 MW was received in November 2019. Meanwhile, Tariff Policy 2016 notified by the Government of India recommended procurement of Renewable Energy (except waste to energy plant) through competitive bidding/market discovered price so as to encourage competition and possibly reduce the tariffs. Considering the nationwide changing scenario for procurement of RE power through competitive process, MSEDCL approached the GoM for allowing procurement of RE power through competitive process. The GoM vide its letter dated 17 July 2017 approved the purchase of Wind, Solar and Bagasse based cogeneration power through Competitive Bidding. Thereafter, on 8 December 2017, Ministry of Power, Government of India notified competitive bidding guidelines for procurement of wind power. Accordingly, MSEDCL started procurement of

Wind energy through competitive bidding from December 2017 onwards. Therefore, when LWEPL approached MSEDCL for signing of EPA in the year 2019, MSEDCL refused to do so as it had already started procurement of Wind power based on competitive bidding. In this regard, the Commission notes that once MSEDCL has started procurement of Wind Energy through competitive bidding which was also approved by the GoM and further which is in line with the provisions of Tariff Policy 2016 notified by the Government of India, it would not be appropriate for Commission to direct MSEDCL to sign EPAs based on generic tariff of previous years.

18.14 LWEPL has also contended that there was delay in issuance of registration from MEDA. Had the registration for these 7 WTGs of 5.6 MW been issued along with registrations of other WTGs in the same project, MSEDCL could have signed EPAs for these projects also. In this regard, the Commission notes that MEDA has issued registrations to around 31.2 MW capacity of LWEPL's project in phases starting from March 2016 to May 2017 and last registration for 7 WTGs of 5.6 MW capacity in November 2019. As per RE Policy 2015, MEDA has to ensure that all necessary documents have been received and project is complete in all aspect before issuance of registration to any project. MEDA has submitted details of activities undertaken before issuance of registration to these 7 WTGs of 5.6 MW capacity. The Commission is not inclined to go into details of the same as LWEPL was equally responsible to follow-up its registration process and if there was delay beyond reasonable limit it should have invoked its legal rights at that time only. Without taking actions at appropriate time, LWEPL now cannot shift the blame fully on MEDA for delay in registration and consequently non signing of EPA.

18.15 In view of the above detailed analysis of relevant applicable policies, the Commission notes that it cannot be concluded that LWEPL has set up its project solely on the assurance of MSEDCL's Wind Policy, 2014. Further, provision of RE Policy 2015 of including around 1350 MW capacity commissioned post completion of 2000 MW targets is just an enabling provision with mandatory condition of registration of project with MEDA. LWEPL has failed to comply with such mandatory condition of registration for a long period, and in the meanwhile based on subsequently notified Tariff Policy 2016 and competitive bidding guidelines, MSEDCL with the approval of the GoM which had notified RE Policy 2015 has started procurement of Wind Power through competitive bidding since December 2017. Therefore, in the opinion of the Commission, MSEDCL cannot be directed to sign EPA for balance capacity of 5.6 MW by relying on MSEDCL's Wind Policy 2014 and RE Policy 2015.

19. **Issue: b) Whether there was an implied contract/agreement between the parties?**

- 19.1 LWEPL has contended that its 7 WTGs of 5.6 MW capacity were commissioned in in FY 2014-15. Since commissioning of these WTGs, LWEPL has been injecting power into the Grid. Based on joint meter reading, MSEDCL has been issuing credit notes to LWEPL and also has used this power for fulfilling its non- Solar RPO targets since FY 2014-15 onwards. Therefore, LWEPL has contended that as MSEDCL has never objected to the injection of power and has enjoyed the benefits of that power in terms of fulfilling its non- Solar RPO targets, by its conduct MSEDCL has accepted the power supplied by LWEPL and acted upon an implied agreement with LWEPL. Signing of EPAs would be just a formality to convert that implied agreement into contract document. For this purpose, LWEPL has relied upon various judgments of the Supreme Court.
- 19.2 While opposing above contention of LWEPL, MSEDCL has stated that it has never consented for signing of EPA and purpose of issuance of monthly credit notes is limited to energy accounting only.
- 19.3 LWEPL's reliance on the concept of implied contract is on the alleged ground that since commissioning of these projects in November 2014 until February, 2020, MSEDCL has never intimated to LWEPL, either expressly or by conduct, that it does not accept or does not wish to accept the power supplied by LWEPL. In this regard, the Commission notes that MSEDCL through its clarification dated 26 September 2014 (just few months before commissioning of the project in November 2014) to its Wind Policy 2014 has stated that although Wind generators can submit documents for signing of EPA with MSEDCL, but discretion of signing of PPA would solely be with MSEDCL. Even after having such communication way back in 2014, LWEPL has continued to inject energy into the grid.
- 19.4 LWEPL has also cited various affidavits filed by MSEDCL before this Commission during RPO verification process wherein MSEDCL has stated that for meeting its RPO, it is signing EPAs at generic tariff with the project developer who is approaching it. In this regard, the Commission notes that there is nothing wrong in these affidavits as LWEPL itself has accepted that barring 5.6 MW disputed capacity, MSEDCL has signed EPAs for balance capacity of 40 MW as per generic tariff applicable at the time of commissioning of the individual WTGs. The Commission also notes that most of these EPAs have been signed post 2 to 3 years of commissioning of the project. This was because, these projects were yet to be registered with MEDA as per mandatory requirement of RE Policy 2015. Post such registration, MSEDCL based on the prevailing policy of procurement at generic tariff, has signed EPAs with retrospective date i.e. for date of commissioning of the project. Thus, the actions as per the prevailing policy has been uniformly followed by MSEDCL.
- 19.5 Therefore, post commissioning of the project, MSEDCL was always hopeful that LWEPL will complete this mandatory process of registration with MEDA and thereafter it would be

able to sign EPAs. Further as stated by the LWEPL itself in this Petition, MSEDCL has insisted on registration of the project before signing of EPAs and hence LWEPL has submitted application for registration with MEDA. Therefore, it is not correct to state that post commissioning of the project, MSEDCL has accepted the power without any conditions. In fact, MSEDCL put condition of registration with MEDA as per RE Policy 2015 before signing of EPA.

19.6 LWEPL has also contended that post commissioning of the project, MSEDCL is regularly issuing credit notes certifying energy injected into the grid and hence recognized and accepted energy generated from the project. In this regard, the Commission notes that monthly credit notes issued by MSEDCL are energy accounting document to demonstrate how much energy is being injected into the Grid. The credit notes are used for financial settlements when there is valid EPA or Open Access permission. In the present case, as agreed by LWEPL, when MSEDCL has entered into EPAs with its projects with retrospective effect from the date of commissioning of the project, such credit notes are used to settle financial bills for the sale of power in past years. Therefore, in the opinion of the Commission, mere issuance of monthly credit notes does not bind MSEDCL to sign EPA with project.

19.7 Thus, in the opinion of the Commission, MSEDCL has communicated to LWEPL in clear terms before commissioning of the project that discretion of signing of EPA is with MSEDCL and post commissioning EPA can be signed only after registration of project with MEDA. MSEDCL has also acted in a fair and just manner by signing the EPAs for all project capacity of 45.6 MW, excluding 5.6 MW with LWEPL projects, wherever the Registration process was completed before December, 2017 and the policy was to procure power at generic tariff. Therefore, it cannot be considered that MSEDCL has provided free consent for procurement of power from LWEPL's project under dispute. Therefore, LWEPL's contention that MSEDCL is in implied contract with free consent cannot be accepted.

20. **Issue: c) Whether LWEPL is eligible for compensation for energy injected by it into the Grid and at what rate?**

20.1 LWEPL has contended that it has supplied electricity to MSEDCL from date of commissioning of these projects i.e. from 5 November 2014 and continues to supply till the WTGs were disconnected on 31 May 2020. Therefore, MSEDCL is duty bound to pay/compensate LWEPL for the same. LWEPL has claimed Rs. 27.19 crore as a compensation from 5 November 2014 till 31 January 2020. MSEDCL has opposed such claim on the ground that energy injected into the grid without valid EPA can not be compensated.

20.2 In this regard, the Commission in earlier paragraphs has already held that MSEDCL cannot

be mandated under the prevailing policy framework to sign EPA with disputed capacity of 5.6 MW. The Commission has also rejected LWEPL's contention that MSEDCL is in implied contract with free consent. Therefore, all these years, LWEPL was injecting energy into the Grid from this disputed capacity of 5.6 MW without any valid EPA and thus is not eligible for any compensation.

20.3 The APTEL, in its various judgments has ruled that entity injecting any energy into the grid without a valid contract need not be compensated. APTEL in its Judgment dated 16 May 2011 in *M/s Indo Rama Synthetics Vs MERC* has explained the importance of PPA for injecting power into the Grid and thereafter held that no compensation shall be payable for energy injected without agreement. Relevant part of the APTEL Judgment is reproduced below:

*“11 In our opinion the Section 70 and 72 of the Indian Contracts Act, 1872 will not be applicable in the present case. The present case is governed by the Electricity Act, 2003 which is a complete code in itself. In the electricity grid, the SLDC, in accordance with Section 32 of the Act is responsible for scheduling and dispatch of electricity within the state, to monitor the grid operations, to exercise supervision and control over the intra-state transmission system and to carry out grid control and dispatch of electricity though secure and economic operation of the State Grid. All the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid. Moreover, in this case the injection of electricity was without the consent or knowledge of the distribution licensees and the energy generated by the appellant was booked to the distribution licensees for balancing the energy generated/injected with energy consumption in the energy accounting. Accordingly, the decision in *Haji Mohammed Ishaq WD. S.K.Mohammed and others vs. Mohamad Iqbal and Mohamed Ali & Co. Reported in (1978) 2 SCC 493* relied upon by the appellant will also not be of any relevance.*

.....

13 Thus, we do not find any substance in the claim of the appellant for compensation for the power injected into the grid without any schedule and agreement”.

Further, the APTEL in its Judgment dated 8 May 2017 in Appeal No 120 of 2016, has interpreted its earlier two judgments and concluded as follows:

iv. The Respondent No. 1 had also quoted two more judgements of this Tribunal in appeal nos. 267 of 2014 and appeal no. 68 of 2014. In the judgement dated 15.4.2015 in appeal no. 267 of 2014 this Tribunal has held that the Appellant (M/s Cauvery

Power Generation Pvt. Ltd.) is not entitled to claim payment of infirm power injected into the grid without the approval from the Respondent (TANGEDCO) for specific duration as mentioned in the judgement till TANGEDCO conveyed its consent to purchase infirm power. In the judgement dated 30.5.2016 in appeal no. 68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant (M/s OPG Power Generation Pvt. Ltd.) till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC. The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.

- 20.4 The Commission is of the opinion that spirit of these Judgments is important to understand, as it deals with injecting energy into the Grid without valid contract. The Commission would like to specifically mention that the Infirm nature of Wind creates more problem for the procurer when it is being injected without any identified buyer. As stated by the APTEL, such injected energy without valid contract would lead to deviation in drawal or injection into grid and levy of corresponding penalty under Deviation Settlement Mechanism (DSM) in force for ensuring grid discipline. Further in States like Maharashtra where multiple Distribution Licensees and Open Access users are connected to an interconnected Intra-State Transmission network, it would be difficult to identify or pinpoint a single Distribution Licensee / OA user who has consumed such energy injected into the grid. Therefore, to maintain grid discipline and grid security, such injection of energy without any valid EPA or a contract needs to be discouraged. Hence, such injected energy should not get any compensation due to the reasons explained above including the fact that in the interconnected system, any single entity cannot be identified as a user of such uncontracted injected energy.
- 20.5 In the present matter, as held earlier in this Order, MSEDCL had been signing EPA with MEDA registered Wind generators till December 2017 with retrospective effect. Had LWEPL obtained registration from MEDA by that date, then EPA would have been possibly signed for present disputed capacity also. Hence, MSEDCL was fairly considering the possibility that once registration is received, EPA could be signed. The Commission also notes that in the past, during suo-moto proceedings for verification of compliance of RPO targets, MSEDCL had prayed for considering compliance of RPO target based on actual contracted RE capacity and not on the basis of the actual units injected. The Commission had denied the request of MSEDCL while considering reconciled data submitted by MEDA which was based on the IBSM/ FBSM report furnished by MSLDC which included the quantum of power injected into to the grid by WTGs. During the proceeding for verification of compliance of RPO targets for FY 2015-17, held on 2 February 2017 in Case No 169 of

2016, Wind Independent Power Producers Association had raised following comments:

“

MSEDCL is yet to execute EPAs with the Wind Generators commissioned in FY 2014-15-16, but has sought that 1202 MUs from these Generators be counted towards its cumulative RPO compliance. At the moment, there is no binding EPA in place and MSEDCL has not paid anything towards purchase of the power injected into the grid from 2014 onwards. MSEDCL cannot be allowed to use this energy for its Non-Solar RPO compliance on the basis of mere intent to execute EPAs till such time as such EPAs are actually executed. Thus, this statement of MSEDCL with regard to 1202 MUs is intended to mislead the Commission.

The commission had sought detailed information from MSEDCL regarding year wise RE power and RECs procured, execution of EPA with wind generators etc. and further subsequent clarifications to its reply submitted. MSEDCL had provided the requisite information in various submission till 7 March 2018. Finally, based on the submissions of MSEDCL, the Commission had issued the Order on 27 March 2018 considering the energy injected by the Wind generators.

- 20.6 However, to have more clarity, the Commission in the instant matter sought information from MSEDCL whether energy injected from LWEPL's 5.6 MW projects has been considered by it for fulfilment of its non-Solar RPO targets. MSEDCL in reply has stated that it has considered the energy injected from LWEPL's 5.6 MW, towards fulfilment of Non-Solar RPO targets for FY 2014-15, 2015-16 and FY 2016-17 only. As MSEDCL has started procurement of RE power through Competitive bidding from December 2017, it has not considered the energy from these 5.6 MW projects from April 2017 till date.
- 20.7 As per the provisions and further as ruled by the APTEL, energy injected without valid contract is not eligible for any compensation.
- 20.8 The Commission however would like to also consider the conduct of MSEDCL and LWEPL. It has been accepted by MSEDCL that it has taken the benefits of RPO by considering this power for fulfilling its non- Solar RPO targets for three years i.e. from FY 2014-15 to 2016-17 i.e till such time the procurement methodology had not been changed to Competitive Bidding. The Commission thus feels that MSEDCL should compensate LWEPL for that limited period. As there was no valid EPA between the parties, generic tariff applicable at that point of time cannot be made applicable in the present matter. Only other method that can be considered is sale of power at Average Power Purchase Cost (**APPC**) to Distribution Licensee which is akin to REC mechanism. Therefore, the Commission directs MSEDCL to compensate LWEPL for the period of FY 2014-15 to 2016-17 at rate of approved APPC (excluding renewable sources) for respective year. Further, as MSEDCL has used this energy

for meeting its RPO, green attribute of the same also needs to be paid. Hence, in addition to APPC rate, MSEDCL should also compensate LWEPL for such energy at Floor price of non-solar REC prevailing at that point of time. Accordingly, the Commission directs MSEDCL to pay compensation for energy injected by LWEPL from 7 WTGs aggregating 5.6 MW capacity in the year FY 2014-15 to FY 2016-17 at the rate of APPC (excluding RE) plus floor price of non-solar REC applicable for respective year. However, such compensation would be without any carrying cost as MSEDCL was not responsible for delay in raising bills for FY 2014-15 to FY 2016-17.

20.9 Energy injected by LWEPL from FY 2017-18 onwards, which has not been utilized by MSEDCL for its RPO, needs to be treated as energy injection without a valid EPA and hence can not be compensated.

21. **Issue: d) Balance of Convenience/equitability/Way forward**

21.1 Having ruled as above, the Commission notes that as of today, LWEPL does not have valid EPA and hence cannot continue to inject energy into the Grid. LWEPL in its submission has also referred to the Office Memorandum of the Ministry of New and Renewable Energy, Government of India, stating that renewable energy is having 'must run' status and during the period of Lock Down also said 'must run' status should be maintained. In the opinion of the Commission this Office memorandum is applicable to Renewable Generators having valid EPAs and cannot be made applicable to LWEPL's 5.6 MW capacity which does not have any valid EPA. Therefore, MSEDCL is free to take appropriate actions as per instructions of MSLDC in case LWEPL is not able to produce valid contract for injecting energy into the Grid.

21.2 The Commission notes that although LWEPL has various options such as sale to Open Access consumer, sale to Other Distribution Licensee in the State or opt for REC mechanism, it can also exercise option provided under MERC RE Tariff Regulations, 2019. Regulation 7.3 of RE Tariff Regulations, 2019 has an enabling provision of signing of EPA with distribution licensee at recently discovered tariff if such project capacity is below the threshold limit specified for competitive bidding process. If both parties agree, they may utilize this provision of these Regulations for signing of long-term agreement at a rate recently discovered and adopted by the Commission on the same terms and conditions which are applicable to such competitively bid EPA. This will end uncertainty about EPA for the generator, at the same time MSEDCL will not be put to any disadvantage as the energy if procured will be as per the extant policy of procurement and also at competitively discovered rate.


22. In the opinion of the Commission, MSEDCL may provide such option to other similarly placed Wind generators also.
23. Further, in view of above rulings in the matter, MA No. 38 of 2020 filed by LWEPL requesting restriction on disconnection of seven WTGs aggregating 5.6 MW becomes infructuous.
24. Hence, the following Order:

ORDER

1. **The Case No. 60 of 2020 is partly allowed and MA No. 38 of 2020 is disposed of accordingly.**
2. **Maharashtra State Electricity Distribution Company Limited cannot be compelled to sign Energy Purchase Agreement with Lalpur Wind Energy Pvt. Ltd. for its 7 WTGs aggregating 5.6 MW.**
3. **Maharashtra State Electricity Distribution Company Limited is directed to compensate Lalpur Wind Energy Pvt. Ltd. for the energy injected from 7 WTGs aggregating 5.6 MW during FY 2014-15 to FY 2016-17 which has already been considered by it for fulfilment of non-Solar RPO targets, at Average Power Purchase Cost (excluding Renewable Energy) plus floor price of non-solar REC applicable for respective years. Such compensation would be without any carrying cost.**
4. **Lalpur Wind Energy Pvt. Ltd is not entitled to claim any compensation for the energy injected by it since April, 2017 onwards from its 5.6 MW projects in the absence of any valid Energy Purchase Agreement.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member


(Abhijit Deshpande)
Secretary

