

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 57 of 2020

Case of DLI Power (India) Private Limited for recovery of outstanding payments including delayed payment charges under the Energy Purchase Agreement dated 6 December 2010 with Maharashtra State Electricity Distribution Company Limited and adjustment in tariff for recovery of the expenses incurred on ensuring online visibility of generating unit with SLDC.

Coram

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

DLI Power (India) Private Limited

.....Petitioner

V/s

Maharashtra State Electricity Distribution Company Limited.Respondent

Appearance

For the Petitioner

:Smt. Deepa Chawan (Adv.)

For the Respondent

:Shri Ashish Singh (Adv)

ORDER

Date: 29 October 2020

1. DLI Power (India) Private Limited (**DLIPPL**) has filed this Case dated 17 February 2020 against Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) for recovery of outstanding payments including Delayed Payment Charges (**DPC**) under the Energy Purchase Agreement (**EPA**) dated 6 December 2010 with MSEDCL and adjustment in tariff for recovery of the expenses incurred on ensuring online visibility of generating unit with SLDC

2. **Main Prayers of DLIPPL are as follows:**

a) *Direct MSEDCL to make payment of the amounts outstanding towards DPC due as per the EPA being a sum of Rs. 38,24,100/- which is outstanding DPC for the Petitioners*

Project as on 01.01.2020 for the monthly energy bills till September 2019 as also detailed in Annexure-14-A.

- b) Declare that the online visibility with SLDC as per the Respondent, MSEDCL's direction dated 04.01.2019 being Annexure-14-A is an illegal directive contrary to law and in breach of the EPA dated 06.12.2010 and discriminatory.*
- c) Direct MSEDCL to make payment of the amounts incurred by the Petitioner towards ensuring online visibility with SLDC as per the Respondent, MSEDCL's direction dated 04.01.2019 being Annexure "16".*
- d) Direct MSEDCL to effect payments of the invoices to be raised by the Petitioner adhering to the terms of EPA in letter and spirit and keep paying dues, as and when payable;*
- e) Direct MSEDCL to pay carrying cost at the rate of 15.20%(SBI PLR 13.20% + 2%)per annum of the 68 days delay in payment of DPC by the Respondent beyond 60 days from the due date;*
- f) Direct MSEDCL to make monthly payments along with DPC in case of any delay in making payment of invoices to be issued under the EPA dated 06.12.2010;*
- g) Allow the Petitioner to revive this Petition in case of further default by the Respondent under the EPA;*
- h) This Hon'ble Commission be pleased to order interim and ad-interim reliefs in terms of prayer (a) above;*

3. DLIPPL in its Petition has stated as under:

- 3.1 On 15 September, 2005 the Government of Maharashtra (**GoM**) formulated State Hydro Power Policy, accordingly DLIPPL planned to develop the 2 x 2.45 MW Darna Hydro Power Project as Independent Power Producer (**IPP**) with its own funding and operate the Project as per the terms of the Hydro Power Development Agreement (**HPDA**) and transfer the said Project to Government of Maharashtra Water Resource Department (**GoMWRD**). DLIPPL interconnected the Project with MSEDCL system in order to sell electricity to the Purchasers.
- 3.2 On 29 September 2006, the GoMWRD approved the Techno Economic Feasibility Report (**TEFR**) and gave permission for development of the project. On 29 December 2006, DLIPPL submitted a proposal along with TEFR requesting GoMWRD to grant permission for developing Hydro Power Projects under the existing Policy of GoMWRD. On 11 February 2008, HPDA was entered into between DLIPPL and the GoMWRD.
- 3.3 On 27 April 2010, MSEDCL granted grid connectivity for purchasing power from DLIPPL. On 6 December 2010, EPA was executed between DLIPPL and MSEDCL. On 14 July 2010, the Commission issued a generic tariff Order in Case No. 20 of 2010 for determining the tariff for SHPs. On 7 June 2010, MERC (Terms & Conditions for determination of Renewable Energy Tariff) Regulations, 2010 came into force.

- 3.4 On 30 November 2010, the SLDC, Kalwa informed that visibility of the generator to SLDC is not essential.
- 3.5 On 4 January 2013, DLIPPL raised the invoice against the interest on delayed payment of invoices. On 28 October 2013, DLIPPL also addressed a letter to MSEDCL in respect of the delayed payment against invoice dated 4 January 2013.
- 3.6 On 28 October 2013, DLIPPL raised the invoice for Rs. 1,41,523 for the period of December 2012 to October 2013. On 28 April 2015, it raised the invoice for Rs. 4,99,553 for the period of September 2013 to January 2015. On 7 November 2015 it raised the invoice for Rs. 2,10,645 for the period of February 2015 to July 2015.
- 3.7 On 18 December 2015, since the delayed payment charges were not released, MSEDCL was requested to release regular monthly invoice payment within 60 days and also make payment of pending supplementary invoices. On 7 September 2016, DLIPPL raised the invoice for Rs. 1,84,344 for the period of August 2015 to March 2016. On 19 April 2017, since the delayed payment charges were not released, DLIPPL by letter requested the MSEDCL to release of regular monthly invoice payments within due date. On 2 November 2017, DLIPPL raised the invoice for Rs. 6,59,153 for the period of April 2016 to May 2017. On 4 April 2018, it raised the invoice for Rs. 4,27,499 for the period of July 2017 to October 2017.
- 3.8 The APTEL upheld vide its Judgement dated 24 April 2018 and 7 May 2018, in Appeal No. 75 of 2017 and in Appeal Nos. 60, 61, 62, 63, 64, 65, 66, 67 and 68 of 2018 respectively the decision of the Commission asking MSEDCL to make payments to the generator under the EPAs.
- 3.9 On 4 January 2019, MSEDCL by its letter asked DLIPPL to provide continuous Real Time Visibility of DLIPPL's generation at SLDC, on or before 31 January 2019. Further, MSEDCL communicated that any delay in compliance by DLIPPL, may lead to holding of payment against generation bill till DLIPPL provided real time visibility at SLDC. MSEDCL further informed that it would not be responsible for the delay in payment and no interest will be paid for the said period.
- 3.10 On 16 January 2019, DLIPPL addressed a letter to MSEDCL forwarding the decision of SLDC with regard to real time visibility. It was pointed out that the unilateral deadlines and unilateral imposition of conditions by MSEDCL were unjust.
- 3.11 On 1 March 2019, DLIPPL placed an order on M/s. Advent Engineers for establishing the RTU Panel and integration with SLDC. DLIPPL is a Small Hydro Power Generator and as MSEDCL had unilaterally altered and amended or infringed the EPA executed between the parties. DLIPPL was coerced and under duress to ensure online visibility to SLDC.
- 3.12 On 19 March 2019, DLIPPL pointed out to MSEDCL that insistence on real time visibility at SLDC was unfair. However, MSEDCL did not reply to the aforesaid communications of DLIPPL. DLIPPL had no choice but to accede to the directions and stipulations of MSEDCL. On 26 March 2019, a meeting was held with SLDC and

DLIPPL. Document containing Minutes of Meeting with SLDC was forwarded to MSEDCL on 27 March.2019.

- 3.13 On 11 April 2019, DLIPPL raised the invoice for Rs. 5,98,777 for the period of December 2017 to September 2018; Invoice dated 12 April 2019 for Rs. 3,72,186 for the period of November 2018; Invoice dated 17 April 2019, for Rs. 1,33,459 for the period of April 2012 to July 2018 for interest on delayed payment of water cess reimbursement invoices.
- 3.14 On 18 April 2019 and 25 April 2019 DLIPPL addressed a letter to MSEDCL pointing out that the real time visibility had been completed and requested for release of withheld payment on urgent basis. On 2 May 2019, further mail was forwarded to MSEDCL enclosing the image of the online visibility but MSEDCL failed to pay the invoices of DLIPPL including the principal amount. MSEDCL has not paid the bills issued since April 2012 for the electricity supplied by DLIPPL.
- 3.15 On 16 July 2019, since DLIPPL was facing hardship, in servicing on time the loans from lender, it requested MSEDCL to look into the matter of delayed payments not received for invoices, since commissioning of the Project. DLIPPL further protested by said letter against the action of MSEDCL, withholding payment of invoices from November 2018 for want of online visibility with SLDC, Kalwa. DLIPPL further requested MSEDCL to release payments, relying on the Order dated 9 January 2019 in Case No. 294 of 2018.
- 3.16 As per Article 6.6 of the EPA a credit period of 60 days, from the date of receipt of the Invoice is available to MSEDCL for releasing the payments. Under the EPA, DLIPPL is entitled to DPC at the rate of 1.25% per month, in the event of delay beyond the stipulated credit period from the date of receipt of Invoice. Clause 10.1 of the EPA for the said project states the term of the EPA to be 35 years from the date of the commercial operations of the Power Plant.
- 3.17 MSEDCL has intentionally failed to make the payment of invoices raised by DLIPPL since April 2012 to April 2019 which aggregates to Rs. 38,24,100 as on 1 January 2020. Also, it has deliberately withheld the payments of invoices raised by DLIPPL on 4 January 2019 for the want of online visibility of Darana HEP with SLDC Kalwa, which is beyond the purview of EPA
- 3.18 The insistence of MSEDCL on the real time visibility at SLDC, Kalwa seems to be raised for not making payments of invoices raised by DLIPPL for the electricity supplied to MSEDCL. This insistence is also a unilateral imposition of a condition without authority of law. Further, this insistence is also modification of the EPA and hence, illegal as it is unilateral. The imposition of the condition of online visibility by MSEDCL was outside the legal purview of MSEDCL. This insistence has gravely impacted the financial health and servicing of loans by DLIPPL.
- 3.19 Initially MSEDCL had made payments against principal sums for the invoices raised by DLIPPL such payments were delayed and made after expiry of the credit period of 60 days from the date of receipt of the invoice. In view thereof, MSEDCL is liable to pay DPC at 1.25% per month on the delayed payment as per terms of the EPA. MSEDCL has

failed to make payments for the DPC invoices raised by DLIPPL repeatedly since the month of January 2013 for the monthly Invoice of January 2011 upto September 2019 for which the DPC is due for an amount of Rs. 38,24,100 as on 1 January 2020.

- 3.20 The provisions of the Act or the Regulations framed thereunder did not devolve any authority or jurisdiction on MSEDCL to impose the condition of online visibility with SLDC and sit in appeal over the decision of the SLDC dated 30 November, 2010. The letter dated 4 January 2019 addressed by MSEDCL is ex-facie illegal and untenable in law.
- 3.21 It is understood that the condition of online visibility with SLDC was not imposed on similarly placed SHPs and therefore, the direction contained in the letter dated 4 January 2019 issued by MSEDCL was illegal and discriminatory and violative of Article 14 of the Constitution of India. MSEDCL ought to compensate DLIPPL towards the cost incurred for the said online visibility with SLDC.
- 3.22 MSEDCL should be directed to reimburse the fees and cost of the Petition to DLIPPL or in the alternate, if the Commission deems fit the same may be waived off.

4. MSEDCL in its reply dated 28 April 2020 has stated that:

- 4.1 MSEDCL has paid the principal amount of Rs.6.52 Crs in FY 2019-20 for November 2018 up to December 2019 generation months. The total outstanding as on 17 April 2020 is Rs.1.85 Crs in respect of January to March 2020 generation Months and out of which Rs. 0.43 Crs for January 2020 month invoice is due till date and remaining Rs.1.41 Crs are due on 5 May 2020 and 5 June 2020.
- 4.2 Regarding carrying cost at the rate of 15.20% for delay in payment of DPC beyond 60 days from due date, there is no specific clause in EPA for the same.
- 4.3 The delay in payment is basically due to non-payment of bills by agriculture consumers. Similarly, the arrears of government departments for supply of electricity to public water works and street light consumers category are accumulated, The Commission had allowed very little provision for bad debts in spite of having largest consumer base and rural area covered which has less prospects to pay on time. Further the Commission allowed provision for bad debts of 1.5% of receivables in MERC MYT Regulations. However, more than 85% arrears are attributable to agricultural and Government department dues against supply of electricity. Thus, if there are no funds available with MSEDCL, because of delayed ARR outstanding from Government and agricultural arrears, it may not be always possible to make timely payments to the wind generators. Therefore, the delay is not intentional and deliberate; rather to the contrary the MSEDCL is clearing the outstanding dues as per the availability of fund.
- 4.4 The payment for the energy supplied, along with payment of DPC for late payments, is a basic and express obligation of MSEDCL under the EPAs, and the failure to discharge it or to cure such failure within the stipulated time is an event of 'immediate default' and would, therefore, entitle the Seller to terminate the EPAs as per Clauses

in EPA. Hence DLIPPL shall be relieved of its obligation to supply power to MSEDCL so that the generator can sell its power to any other buyer who can make the payments promptly.

- 4.5 The issue of recovery of cost incurred for online visibility with SLDC- various legal provisions in Regulations such as State Grid Code Regulations, 2006, MERC Transmission Open Access Regulations, 2016 and CERC Communication Regulations, 2017 mandate generators to have real time visibility at SLDC so that SLDC can take real time decision in order to have secure grid operations.
- 4.6 Hence it is mandatory that every generator at its cost shall install Remote Terminal Unit (**RTU**) to have real time visibility at SLDC. If there is no requirement of real time visibility at SLDC, SLDC should have mentioned in its MoM dated 26 March 2019. However, SLDC allowed them to carry forward their work of providing real time visibility.
- 4.7 MSEDCL has issued a notice to DLIPPL on 4 January 2019 for providing real time visibility of Small Hydro generation at SLDC Airoli. Upon the receipt of Notice, DLIPPL has provided the real time visibility at SLDC Airoli on 3 May 2019. Thus, the claim of DLIPPL in this regard has no merit and therefore is not tenable.

5. DLIPPL in its Rejoinder dated 20 July 2020 has stated as under:

- 5.1 MSEDCL has pleaded non-availability of funds as justification for non-payment. The outstanding as on 1 January 2020 is Rs.38.24 lakhs. The carrying Cost is a financial principle evolved as time value for money. In a catena of judgements, the Hon'ble APTEL and the Hon'ble Supreme Court have upheld this principle. MSEDCL therefore, is precluded from taking any contrary contention thereon. In view of the admitted delay in payment, the MSEDCL is bound to pay the Carrying Cost.
- 5.2 MSEDCL has admitted its obligation under the EPA to make payments on time. This admission goes to the root of the matter. The option, if any which are available to the seller, due to non-payment by MSEDCL, include seeking redress for non-payment towards electricity supplied, as provided in law. MSEDCL is statutorily bound to pay DLIPPL, on time for the energy supplied.
- 5.3 Regarding online visibility with SLDC, there is no provision in EA, 2003 or the Regulations framed thereunder for MSEDCL to usurp any power of SLDC or insist on any specific compliances on behalf of SLDC. Further, any grievance which MSEDCL may have against SLDC cannot be grouse to justify non-payment for electricity received from DLIPPL. MSEDCL has not been able to show any provision which confers power and authority on it to deny payment to a generator on the ground of no real time visibility at SLDC. MSEDCL is well aware that even this requirement was fulfilled by the DLIPPL and the same could not have been attained overnight, as it involved procuring the equipment, financial arrangements and consideration of technical requirements including liaising with SLDC. The Commission be pleased to take a serious view of the unjustified

and arbitrary action of MSEDCL in denying a generator like DLIPPL, payment for electricity supplied by it for extraneous reasons, which are palpably illegal.

6. At the e-hearing through video conferencing held on 16 October 2020, the Advocate of DLIPPL reiterated its submission in the Petition and in the Rejoinder. The Advocate of MSEDCL reiterated its submission in the reply and stated that majority of principal amount has been paid however, DPC amount has not been paid. The letter dated 4 January 2019 issued by MSEDCL regarding real time visibility at SLDC is as per the provision of various Regulations of the Commission.

Commission's Analysis and Ruling:

7. DLIPPL is Hydro Generator having capacity of 4.9 MW and it executed EPA with MSEDCL on 6 December 2010. DLIPPL through instant Case has approached the Commission for payment of DPC amount of Rs. 34.24 lakhs, Carrying cost at the rate of 15.20% on outstanding DPC and payment of the amounts incurred towards online visibility DLIPPL's Generating Unit with SLDC.
8. The Commission notes that DLIPPL has not specifically mentioned the outstanding Principal amount but has only stated that MSEDCL had made payments against principal amount but with some delay i.e after expiry of the credit period, for which DPC amount of Rs. 34.24 lakhs was being claimed by DLIPPL. DLIPPL has not specified the amount withheld by MSEDCL for want of online visibility. MSEDCL in its Reply dated 28 April 2020 has also not specifically stated the outstanding amounts to be paid as against the amount claimed by DLIPPL in the instant case, but made the generalized submission that it has paid the principal amount of Rs. 6.52 Crs in FY 2019-20 from November 2018 up to December 2019 generation months. The total outstanding as on 17 April 2020 is Rs.1.85 Crs in respect of January to March 2020 generation Months.
9. When the Petition involves non-payment of billed amount, it is expected that Respondent in its Reply specifically states the factual position against alleged non-payment. Instead of providing specifics, filing of Reply in generic manner does not help the process of adjudication. The Commission directs MSEDCL to ensure that in future it files proper replies providing factual aspects against specific relief sought in the Petition in addition to any other details which it thinks fit to defend its case.
10. Notwithstanding above, based on details available on records, the Commission has summarized the amount claimed by DLIPPL and payments to be made as per MSEDCL as below:

Sr. No	Particulars	Claimed as per Petition	MSEDCL's submission
1	Outstanding Principal amount (Rs. in lakh)	Not mentioned	185.00
2	Principal Outstanding period	-	January to March 2020
3	Delay Payment Charge (Rs. In Lakh)	34.24	34.24
4	DPC Period	April 2012 to April 2019	April 2012 to April 2019

5	Carrying cost on DPC	At the rate of 15.20%	Not agreed
6	Total outstanding amount (Rs. Lakh)	34.24	219.24

11. While defending non-payment/delayed payment of invoices, MSEDCL has repeated identical reasons such as low recovery from Agricultural consumers, arrears from Govt. department, lower provisions of bad debt in ARR etc. which it has been stating in all similar cases. The Commission finds that such justification is being repeated without providing any details about efforts taken by MSEDCL to surmount such difficulties. Further such inefficiencies / non-action of MSEDCL cannot be reason for denying legitimate payment to generators. Hon'ble Appellate Tribunal in its Judgment dated 24 April 2018 in Appel No. 75 of 2017 has specifically rejected such reason of MSEDCL as follows:

*“vii. In view of our discussions as above, we are of the considered opinion that the Appellant has not disputed the liability of payment of surcharge to the Respondent No.2 and the issues raised by the Appellant related to late payments due to difficult cash flow situation arising out of regulatory issues in its ARR are not related to the subject matter of the petition. These issues can only be dealt in the proceedings on its petition on ARR/APR or difficulty removal/norms relaxation petition before the State Commission. **It is the responsibility of the Appellant to arrange funds and to make timely payments to the generators based on contracts /regulations.** In any case, the Appellant is free to raise the said issues before the State Commission in its ARR/APR petition and seek suitable remedy.” [emphasis added]*

Therefore, it is not proper on part of MSEDCL to provide same and identical reasons for non-payment of legitimate claims of generators. MSEDCL may have faced issue of revenue shortfall in recent time due to Covid-19 pandemic, but the same has not been stated with the factual details in its reply and the same old justifications have been resubmitted without any plan or way forward to make the payments to the generator. This casual approach of MSEDCL while filing replies to the Petition is not acceptable.

12. As MSEDCL has failed to provide specific reasons backed by statistical information for its inability to make payment, the Commission directs MSEDCL to pay outstanding DPC amount as prayed for in the Petition, subject to verification of claim by MSEDCL, within 30 days from issuance of this Order. If MSEDCL fails to pay such amount within 30 days, then it shall pay interest on such DPC amount for delayed period at interest rate of 1.25 % per month.
13. The Commission also notes that MSEDCL has argued that as it has failed in making regular payment, it is default under the EPA and hence this EPA be terminated and DLIPPL be freed to sell its power to any buyer. In the opinion of the Commission such relief of termination of EPA on account of default of MSEDCL can be sought by DLIPPL which is affected party. It is not appropriate on the part of MSEDCL to make default in payment and thereafter suggest the generator to seek termination of EPA.

14. In this Petition, DLIPPL has also sought cost incurred on providing visibility of its Generating Units to SLDC. DLIPPL has objected that MSEDCL on its own directed it to provide such visibility when SLDC had not asked for it. DLIPPL has also objected to MSEDCL's action of holding the payment till such visibility is established. While opposing the contentions of DLIPPL, MSEDCL stated that the provisions in State Grid Code Regulations, 2006, MERC Transmission Open Access Regulations, 2016 and CERC Communication Regulations, 2017 mandate generators to provide real time visibility to SLDC so that SLDC can take real time decision in order to have secure grid operations. Hence the letter issued by MSEDCL on 4 January 2019 is not illegal.
15. In this regard, the Commission notes that SLDC vide its letter dated 30 November 2010 has informed DLIPPL as follows:

"In context to your letter under reference it is to communicate that since your plant is situated in MSEDCL area and you are planning to sale entire power to the MSEDCL on long term basis, visibility of the generator to SLDC is not essential as the power injected would be consumed there itself."

Thus, in the year 2010 SLDC had informed DLIPPL that as its project was situated in MSEDCL area (connected to distribution network) and supplying power to MSEDCL under EPA, it is not required to provide visibility of generating unit to SLDC as generated power would be consumed at distribution level only. However, in 2019, MSEDCL by relying upon State Grid Code, Transmission Open Access Regulations and CERC communication Regulations, asked DLIPPL to provide visibility to SLDC. The Commission notes that these Regulations relied upon by MSEDCL are applicable to generating units which are connected to transmission system. Admittedly, DLIPPL's generating units are connected to distribution system and not to transmission system. Hence, strictly speaking, provisions of these Regulations would not be applicable to DLIPPL.

16. With the above background, the Commission notes that MSEDCL directing DLIPPL to provide visibility of its generating unit to SLDC without any such specific requirement as per the Regulations and also without any such request from SLDC was not appropriate. However, the Commission is not inclined to order refund of expenses incurred on providing such visibility as DLIPPL chose not to approach the Commission when such direction was issued to it by MSEDCL. DLIPPL has implemented such direction in furtherance of the discussion with SLDC held in the regard and now at belated stage as an afterthought has approached to the Commission against such direction. Anyway, cost incurred on establishing communication with SLDC, equipment which has been installed in generator premises has to be incurred by generator only. Hence, the Commission rejects DLIPPL's prayer seeking refunding of cost incurred on providing visibility to SLDC.
17. Hence, the following Order:

ORDER

1. The Case No. 57 of 2020 is partly allowed.

2. Maharashtra State Electricity Distribution Company Limited is directed to pay outstanding DPC amount as prayed for in the Petition, subject to verification, within 30 days from issuance of this Order. Failing which interest at rate of 1.25 % per month will be applicable on outstanding DPC amount for delayed period.
3. The request of DLI Power (India) Private Limited to direct MSEDCL to make payment of the amounts incurred by DLI Power (India) Private Limited towards online visibility with SLDC is rejected.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

