

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. 108 of 2020

Petition of MSEDCL seeking approval to consider discount in variable charges offered by the Generating Stations for preparation of monthly MOD Stack and Application of amendment of Petition

Coram

I. M. Bohari, Member
Mukesh Khullar, Member

Maharashtra State Electricity Distribution Company Ltd.	.....Petitioner
V/s	
Maharashtra State Load Despatch Centre (MSLDC)	.... Respondent No. 1
RattanIndia Power Limited (RIPL)	.....Respondent No. 2
Maharashtra State Power Generation Company Ltd. (MSPGCL)	.... Respondent No. 3
NTPC Ltd.	.... Respondent No. 4
Adani Power Maharashtra Ltd. (APML)	.... Respondent No. 5
GMR Warora Energy Ltd. (GMR)	.... Respondent No. 6
JSW Energy Ltd. (JSWEL)	.... Respondent No. 7
Coastal Gujarat Power Ltd. (CGPL)	.... Respondent No. 8
Adani Electricity Mumbai Ltd.- Generation (AEML-G)	.... Respondent No. 9
Tata Power Company Ltd.- Generation (TPC-G)	.... Respondent No. 10
Vidarbha Industries Pvt. Ltd.- Generation (VIPL-G)	.... Respondent No. 11

Appearance:

For the Petitioner	: Smt Deepa Chawan (Adv.)
For MSLDC	: Shri Piyush Sharma (Rep.)
For RIPL	: Shri Vishrov Mukarjee (Adv.)
For MSPGCL	: Shri Vijay Rathod (Rep.)
For APML	: Shri M. R. Krishna Rao (Rep.)

For GMR	: Shri Venkatesh (Adv.)
For JSWEL	: Shri Suraj Guru (Adv.)
For AEML-G	: Shri Abaji Naralkar (Rep.)
For TPC-G	: Shri Prashant Kumar (Rep.)
For VIPL-G	: Shri Himanshu Agarwal (Rep.)

ORDER

Dated: 1 February 2021

1. Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**) has filed a Petition under Regulation 92, 94 and 96 of MERC (Conduct of Business) Regulations, 2004 (**CBR Regulations**) seeking approval to consider discount in variable charges offered by the Generating Stations for preparation of Merit Order Despatch (**MOD**) Stack for the month of May and June 2020 or till the level of coal stock of the respective Generating Station comes to the level specified by the Central Electricity Authority (**CEA**).
2. **Petitioner's main prayers are as follows:**
 - a. *To consider MSEDCL's request for urgent listing of the matter as the MoD for the month of May 2020 is implemented from 12.05.2020 at 00.00 hrs.*
 - b. *To allow MSEDCL to consider discounted rate in variable rates offered by the generators in the generating unit/ stations for preparation MoD for the month of May 2020 and June 2020 or till the level of coal stock of offered Generating unit/station comes to the level specified by CEA norms.*
3. **Petitioner has stated as follows:**
 - 3.1 Present Petition has been filed seeking approval of the Commission to consider discount offered by the Generating Stations in variable charges for preparation of MOD stack for the month of May and June 2020.
 - 3.2 In accordance with the Order dated 17 May 2007 in Case No. 42 of 2006 (**ABT Order**), the MOD Stack is prepared based on the variable charge inclusive of Fuel Adjustment Charges (**FAC**), and accordingly various Generating Stations are required to furnish the details of the prevalent fuel charges to Maharashtra State Load Despatch Centre (**MSLDC**) from time to time to enable MSLDC to develop centralized monthly MOD stack for the State as a whole.
 - 3.3 In accordance with the Daily Order dated 27 October 2016 in Case No. 125 of 2016, MSLDC conducted a meeting on 5 November 2016 with representatives of the MSEDCL and the Generating Companies having Power Purchase Agreements (**PPAs**) under Section 62 of the Electricity Act, 2003 (**EA**) and it was agreed that in order to have uniformity in period of data used for preparation of MOD Stack, (n-2) month data can be submitted to MSLDC. Accordingly, MSEDCL prepares its monthly MOD considering Energy Charges for (n-2) month.

- 3.4 The Government of India on 24 March 2020 imposed Lockdown across all States of country including the State of Maharashtra due to COVID-19 pandemic, resulting into closure of almost each and every industrial and commercial activities in the State. Hence, MSEDCL's demand has crashed down from 21570 MW to about 15800 to 17200 MW.
- 3.5 In view of pandemic situation, meetings with all the long term contracted Independent Power Producers (**IPP**) were conducted by Hon'ble Principal Secretary, GoM and CMD, MSEDCL on 13 April 2020 through video conference and also, by Hon'ble Energy Minister, Maharashtra State on 27 April, 2020 through video conference to understand and explain the difficulties being faced by all the stake holders and MSEDCL due to this unprecedented situation. During the meetings, some of the Generators raised the issue of high coal stock at station and safety issues to the plant and people, in view of possible fire hazards due to high temperature during this summer season.
- 3.6 On 2 May 2020, M/s. RattanIndia Power Ltd (**RIPL**) informed that to ensure full availability of the station for supply during entire season, RIPL had built up considerable stock (8.22 lakhs MT) of coal at site, with an additional inventory of 10.12 lakhs MT of washed coal at the coal washery. The coal being highly susceptible to spontaneous burning due to its latent heat, is beginning to pose a huge fire risk due to increasing temperature not just to the plant and people working in the plant but also to nearby villages and the environment.
- 3.7 In view of the hazardous situation, RIPL has proposed to offer a one-time discount for the months of May and June 2020. As part of offer, the energy charge, inclusive of Change in Law (**CIL**) impact, that will be charged by RIPL will be the lower of:
- i. energy charges as per PPA (including normative CIL being paid by MSEDCL currently) i.e. Rs. 3.2441 (Rs. 2.9013/kWh base energy charge plus Rs. 0.3428/kWh normative CIL) and
 - ii. marginal MOD rate at which capacity is being dispatched, with as additional discount of Rs. 0.01/kWh, subject to a floor price of Rs. 3.05/kWh, for the months of May and June – 2020.
- 3.8 All other terms and conditions of PPA remain the same and discount is limited to aforesaid offer.
- 3.9 CEA vide letter dated 8 November 2017 notified new methodology for monitoring of coal stock at coal based thermal power plants which specified the coal stock norms from 15 days to 30 days depending upon the distance of station from coal mine.
- 3.10 On verification of the coal stock data of all the long term contracted thermal generators of MSEDCL, it is observed that MSPGCL's Bhusawal, Khaparkheda and Nasik Units are having coal stocks of 25 to 64 days. NTPC's Lara, Gadarwala, Mauda and Solapur generating stations are having coal stock of 24 to 60 days which is more than the normative coal stock by CEA.
- 3.11 To redress the safety issue of fire hazard to the piled-up coal stock at the above generating plants, MSEDCL, on 4 May 2020, requested Maharashtra State Power

Generation Company Ltd. (**MSPGCL**) and National Thermal Power Corporation (**NTPC**) to offer a discount in variable charges for their stations which are having present coal stock position higher than the CEA norms. MSEDCL also informed the generators that it will consider to issue schedule to such units by incorporating the single discounted rates offered by the generators in the MOD.

3.12 In response, MSPGCL informed that it was not in a position to offer any discount. No reply from NTPC is received in response to MSEDCL's request letter of offering discount.

3.13 The Commission is requested to allow MSEDCL to prepare the MOD considering the discount offered in variable charges for May and June 2020 or till the level of coal stock comes to the level specified by CEA norms, as this will not only help generators to handle this hazardous situation but also would make available a cheaper power for the consumers. MOD for the month of May 2020 will be implemented from 12 May 2020 to 11 June 2020. Hence, the Commission is requested to list the matter urgently.

4. **MSEDCL, in its additional submission dated 10 May 2020 stated that:**

4.1 NTPC has offered the discounted variable charges for the month of May 2020 for its Solapur and Mouda Units with the discounted rates between Rs. 2.84 to Rs. 3.00 /kWh.

5. **After receipt of the Petition, certain queries had been raised on MSEDCL by the Commission. Vide its additional submission dated 20 May 2020, MSEDCL submitted its replies and in its replies, MSEDCL essentially stated that:**

5.1 MOD principles being followed in the State does not allow consideration of any discount offered by generators, however the discount is being offered by generator, due to present unforeseen situation of crash in MSEDCL's demand and thereby causing the safety hazard issue. Since the present MOD principles do not cover such an unforeseen situation, MSEDCL has approached the Commission for its guidelines and approval.

5.2 The discount offered by RIPL is covered under waiver clause in Article 15.5 of PPA. Also, the Parties can undertake reasonable efforts to mitigate the effect of a Pandemic.

5.3 NTPC is regulated by Central Electricity Regulatory Commission (**CERC**). The Multi Year Tariff (**MYT**) Regulations of CERC do not have provision of discount, however the MYT Regulations do not deal with a situation arising from the unforeseen occurrence of a Pandemic and offering of the discount is wholly the decision of NTPC, to mitigate the situation.

5.4 There is no provision of discount in variable charges in the Indian Electricity Grid Code (**IEGC**)/ State Grid. However, as per ABT Order, recent rates are to be considered for MOD purpose. Further, in other States such as Gujarat / Chhattisgarh, most recent rates are considered for computation of MOD stack.

5.5 On account of discount offered by RIPL, there would not be any financial impact on other generators since irrespective of whether the generator is scheduled or not, the Distribution Licensees are required to pay the fixed charges as per generator's plant availability, whereas energy charges are payable on actual generated/ scheduled energy by the generator. Thus, the units which are not run in real time do not have any fuel cost

impact.

Additional submissions:

- 5.6 NTPC, vide its letter dated 7 May 2020, had offered the discounted variable charges for the month of May 2020, for the Mauda and Solapur units. However, vide its letter dated 14 May 2020, NTPC has withdrawn the discount.
- 5.7 MSEDCL suggested that latest and actual rates should be considered for MOD purpose. The ABT Order requires that the Generating Stations shall furnish the details of the prevalent fuel charges during the month. But as per MoM of MSLDC of meeting conducted on 5 November 2016 in accordance with the Daily Order dated 27 October 2016 in Case No. 125 of 2016, a methodology to consider (N-2)th parameters for preparation of MOD stack, was finalized by MSLDC. Hence, actual variable charges of the operating month are not reflecting in MOD stack. However, to follow the principle of least cost dispatch of power precisely, real time variable charges of the operating plant must be known. So, it is necessary that the Generating Stations need to forecast in advance variable charge rates for Nth month within reasonable allowed variation for the purpose of MOD preparation as envisaged in ABT order.
- 5.8 The Generating Stations are having long term FSA with Coal India Ltd. having specific grade of coal. The Generating Companies are booking the coal well in advance. Thus, it is possible for them to project the variable charge rates for Nth month on the basis of the historical trend, the available data of coal, the expected coal mix.
- 5.9 In view of the ABT Order and the unforeseen scenario of the Pandemic resulting in the present situation, MSEDCL requested to allow MSEDCL to consider latest available rates/ the projected/ estimated variable rate, CIL, discounts, etc. for preparation of MOD.
6. **APML, in its replies dated 31 May 2020 stated that:**
- 6.1 Approval to offer discount is akin to changing the Terms and Conditions of the PPA which cannot be approved through this Petition. PPAs under Section 63 of the EA are entered pursuant to the competitive bidding and can be amended by mutual consent of the Parties in terms of the PPA provisions. The Commission cannot intervene or override existing contracts in such a manner by considering the discount provided on the variable charge rate by one of the Parties and sought to be approved by MSEDCL through this Petition.
- 6.2 RIPL is seeking to amend the terms and conditions of its PPA executed with MSEDCL and it is seeking a change in the tariff structure however the same cannot be brought about by this present petition. Such an amendment to the tariff structure of executed PPAs can be carried out by the parties through a supplemental agreement under the PPA provisions and then can be placed before the Commission for its approval. Only after the approval of the Commission, the PPA terms and conditions including the Tariff, can be amended. In the present case, no such supplemental PPA has been filed before the Commission.
- 6.3 In the past also, MSEDCL had sought approval of the PPA amendments, for passing on the discount in Tariff in terms of the SHAKTI Policy. The Commission thereafter had

accorded approval to such supplemental PPAs and allowed the discount to be passed on to consumers.

- 6.4 Certain queries had been raised from the Commission on MSEDCL and MSEDCL, while replying to these queries, has admitted that there is no legal sanction for considering discounted Tariff while preparing the MOD stack in terms of the present mechanism for preparation of MOD stack.
- 6.5 MSEDCL, in its replies has stated that Article 15.5 of the PPA between MSEDCL and RIPL allows such revision or discount in Tariff adopted by the Commission. However, MSEDCL's interpretation is incorrect as the waiver envisaged under Article 15.5 of the PPA is for waiver of any charge for cases of default or breach of PPA and the discount offered is not out of any default or breach.
- 6.6 MSEDCL itself has admitted that neither the IEGC nor the State Grid Code allows consideration of discounted Tariff for preparation of MOD stack. MSEDCL has further stated that as per Para 4.7 of ABT Order, recent rates are to be considered for MOD and MOD can be revised (a) commencement of supply of power by a generating unit under new arrangement/ agreement, (b) revision of variable charges due to Tariff order by Commission and (c) impact of CIL as notified by the Distribution Licensee, as proposed in draft Grid Code. However, RIPL offering discounted Tariff does not fall within either of the three scenarios referred above.
- 6.7 MSEDCL, in its replies has stated that there is no impact on generators getting backed down, on account of consideration of discounted Tariff in MOD stack as generators would continue to get fixed charges and there is no fuel cost incurred as units are not running. However, such contentions are incorrect because thermal generating units are designed to run at maximum capacity and any partial load operation results in degradation of operational parameters. Frequent start-stops also causes degradation to the plant equipment. Furthermore, partial load operation/ backing down adversely affects the fuel procurement planning and blocks funds in unused fuel. If one generator is allowed to offer discounted energy charge rate for MOD to ensure reduction of coal stock of such generator, it will result in building of coal stock of some other generator. Hence, the proposal in the Petition is not a prudent solution.
- 6.8 MSEDCL, in its Petition, has contended that RIPL has offered discount in Tariff owing to risk of fire hazard due to coal stock build up in excess of CEA norms. However, in the reply to the Commission's query MSEDCL itself has admitted that it becomes the responsibility of the Generating Company to take due care and safety precautions of the coal stock as per CEA determined norms of coal stock. This admission on part of MSEDCL renders the entire premise of this Petition infructuous. Moreover, the issue of risk of fire in coal stock at plant due to increasing temperature in the summer season cited in the Petition becomes irrelevant with the fast approaching monsoon season and corresponding reduction in atmospheric temperature.
- 6.9 It is MSEDCL's contention that due to current practice of consideration of (N-2)th months parameters, actual variable rates of the operating month are not reflecting in MOD stack. However, to follow the principle of least cost dispatch, real-time variable charges of the operating plant must be known. So, it is necessary that generating stations

needs to forecast in advance variable rates for Nth month within reasonable allowed variation for the purpose of MOD preparation. APML has objected to such contentions as the subject Petition is for the purpose of considering discounted Tariff in preparing the MOD stack for a short-term period of May and June 2020 and not for seeking modification to the mechanism for preparation of MOD stack.

- 6.10 This kind of practice of allowing discounts will render the approved / adopted Energy Charge meaningless and give rise to misuse by the stakeholders. MOD stack which is supposed to remain constant for the whole month may get amended/revised time and again, if such practices are allowed and it will result in complexities for the MSLDC to handle the daily operations.
- 6.11 In the event, if any generator offers higher discount, it will result in unviability of other generating project and ultimately affects the public interest.
- 6.12 MSEDCL has written selectively only to MSPGCL and NTPC to offer a discount in variable rate for their stations. MSEDCL's such action amount to discriminatory treatment among various generators and on this ground alone the Petition ought to be dismissed. MSEDCL has wrongly claimed that it has informed the generators that it will consider to issue schedule to such units by incorporating the single discounted rates offered by the generators in the MOD. No such intimation from MSEDCL was received by Adani.

7. **MSPGCL, in its replies dated 31 May 2020 stated that:**

- 7.1 The CEA circular dated 8 January 2017 cited by MSEDCL is meant for monitoring the coal supply positions at different Generating Stations so that the stations having poor stock can be supplied with priority and is not in any way related to the coal stock limit at which there may be some fire hazard. Practically for coal, fire hazards are always there at any level of stock.
- 7.2 Managing the coal stock during the summer season is anyhow a regular exercise for the Generating Companies. Only thing is that the Generating Companies need to take more precautions this time with higher than normal stock and MSPGCL is already taking such additional precautionary measures.
- 7.3 Offering any discount on energy charge for clearing the coal stock is not a practicable solution to avoid fire hazards. Also, as the drop in demand is the main issue, even if it is assumed that the proposal by RIPL is acceptable and thus RIPL units will get scheduled, only thing that would happen is that the "fire hazard" would get shifted to some other station.
- 7.4 Even if it is accepted that there are some operational difficulties to RIPL in managing and protecting the coal stock from fire hazards, it is not clear why RIPL itself has not filed the Petition before the Commission for removal of its difficulty. Instead, RIPL has given some ambiguous proposal to MSEDCL. There is no specific discount rate specified.
- 7.5 There is no provision in MERC MYT Regulations or in MOD Guidelines or in any other Regulations under which MSEDCL can ask for discount in Tariff from other contracted generators.

- 7.6 In absence of a transparent process, offering any discount against such random offer will always be an open-ended process. Such practice of offering random discount is contrary to set principle of Tariff determination under Section 62 of the EA.
- 7.7 The coal price and coal GCV are practically uncontrollable for the generator and thus the discount in energy charge is possible only when the actual efficiency is better than norms or otherwise for a generator under Section 63, the possibility of offering discount arises only when it has factored some parts of fixed charges in its variable charge which it can defer for some period.
- 7.8 MYT Regulations, 2019 allows the Generating Companies to opt for Tariff lower than the approved Tariff on agreeing to deviation from operational parameters, reduction in Operation and Maintenance (**O&M**) expenses, reduced Return on Equity (**ROE**) and incentive specified in these Regulations. So, for a generator under Section 62 of the EA, discount in energy charge is possible only if there is improvement in operating parameters. Thus, in the present case, when there is no improvement envisaged in operating parameters, it will be possible for a generator to give such discount only when fuel price in Rs./Mkcal is considered at lower level than the actual. However, in such case this will result in loss to the generator, even though the Tariff to the consumers will get reduced.
- 7.9 With the objective of getting schedule under MOD, similar discount was earlier offered by RIPL in FY 2017-18 vide its Petition in Case No. 100 of 2017. That time, MSEDCL argued that such proposal by any Generator to offer discount in the CIL reimbursement to attain priority in the MOD Stack needs to be legally checked. The Petition was however subsequently withdrawn by RIPL as its units were getting schedule in normal course also, without any discount in Tariff.
- 7.10 In reference to the difficulty raised by RIPL regarding coal stock built up due to un-requisitioned power, it is submitted that if MSEDCL is really concerned about the difficulties to RIPL, it can allow RIPL to sell the un-requisitioned power in open market at mutually agreed terms, with prior permission of the Commission as mentioned in National Tariff Policy, 2016.
- 7.11 Such suo-motu action by MSEDCL, for which there are no specific Guidelines and there is no transparency in the discounts being offered, is against the statutory provisions and may lead to chaotic conditions where for the sake of getting units scheduled, the generators are enticed to indulge into opportunistic practices.
- 7.12 MSEDCL could not establish the relation between CEA norms and fire hazard level for coal stock. Even RIPL itself has nowhere mentioned anything regarding CEA coal stock limits in its discount offer letter dated 4 May 2020. Hence, relating the CEA coal stock with the fire hazards is sole idea of MSEDCL.
- 7.13 In the initial submission dated 10 May 2020, MSEDCL had not raised concerns regarding the “N-2” methodology adopted presently for declaration of rates for MOD stack.
- 7.14 MSEDCL has also cited the examples of practice adopted by Gujarat State of revising the MOD stack. However, MSPGCL submits that it is not a case that rates for all

generators are changed daily. The rates for the Generating Units of GSEPCL are not changing. Only the rates for NTPC and some of the IPPs are changing.

- 7.15 MSPGCL supports the consideration of “N”th month data for ‘N’th month MOD with a pre-condition that in case of generator under Section 62 of the EA, the key coal parameters for the coal to be utilized in the “N”th month must be fully available to the generator at the time of projection of MOD rates and in case of generator under Section 63 of the EA, it should have clarity on the “Change In Law” claims it would raise.
- 7.16 Reliable information regarding coal prices and coal quality can be available well in advance only in case of purely imported coal-based units and to a large extent in case of pit-head units and having only single source for small capacity plants. In case of non-pit head stations, where coal is sourced from different sources, even the data for latest month i.e. “N-1”st month is not available on 11th of the month. The only reliable data available on 11th of the month is data for “N-2” month.
- 7.17 There is lack of surety from coal companies regarding supply of coal in particular quantity and of particular quality. There is vast difference in booking quantity and received quantity and there is no pattern for such deviations. Also, the coal sources are also varying from time to time. This is one of the difficulties MSPGCL is facing in providing the projections based on “N”th month data. Unless there is firm commitment from coal companies regarding quantity of coal being supplied, MSPGCL cannot anticipate the receivable quantity on the basis of some assumptions.
- 7.18 There is further uncertainty regarding the quality that will be received and this is the second critical difficulty for MSPGCL in providing the projections based on “N”th month data.
- 7.19 If the Commission is of the opinion that computation of MOD rates should be done as per “N”th month data, the Commission should implead the Coal India Limited as well as Central Institute of Mining and Fuel Research (CIMFR) in the present matter and issue the necessary directions to them for providing coal supply plan in time for coal quantity as well as quality, abide them for providing coal analysis reports within a period of 10 to 12 days, so that MSPGCL can estimate the projected energy charge with reasonable accuracy and thus it will help in implementation of MOD stack at least in “N-1”th month.
- 7.20 Unless these critical difficulties are resolved, it should not be made obligatory for MSPGCL to submit the MOD rates as per “N”th or “N-1”th month data. Further, as far as possible, parity should be maintained with other generators also in this regard. In view of the above, the Commission is requested to dismiss the present Petition filed by MSEDCL.

8 RIPL, in its replies dated 1 June 2020 stated that:

- 8.1 In light of the unforeseeable COVID-19 situation, the primary objective is to ensure that the Generating Companies are able to utilize the excess coal stock so that potential fire hazards due to storing excess coal can be averted, while ensuring that the financial burden on MSEDCL is reduced. The Commission may consider devising an appropriate mechanism to liquidate excess coal stock lying with the Generating Companies

considering the prevailing circumstances.

- 8.2 Section 86 of the EA as well as Article 15.3.1 of the PPAs permit the Parties to amend or supplement the terms of the PPAs, subject to approval of the Commission. In the present case, RIPL has submitted an offer. MSEDCL being agreeable to the offer has sought regulatory approval for the same. Further, assuming that there is no provision in either the PPAs or the Regulations and past Orders of the Commission for accepting such discount, the Commission has regulatory powers under Section 86(1)(b) of the EA (as held in Energy Watchdog v. CERC) to allow such measures.
- 8.3 Consideration of the proposal of discount submitted by RIPL (and other Generating Companies) will be beneficial for the consumers of Maharashtra since the same will reduce the cost of power.
- 8.4 As per the ABT Order and daily orders dated 4 October 2016 and 27 October 2016 passed in Case No. 125 of 2016 by the Commission, the MOD stack is to be prepared based on latest available energy charge data. The N-1 or N-2 condition is applicable when data is not readily available. Therefore, where data is available for the current period, MOD stack ought to take into account current data in order to ensure the right MOD schedule and ensuring consumers pay for the least cost power.
- 8.5 The Commission is requested to consider MSEDCL's proposal and take into account the discounted Tariff offered by RIPL in this regard. By offering the proposed discount in Tariff, RIPL is neither seeking amendment of the terms of the PPAs nor foregoing its rights and interests arising therefrom. Upon expiry of the period for which the discount has been offered (viz., May 2020 and June 2020), the Tariff will revert to the Tariff in accordance with the PPAs.

9 MSLDC, in its replies dated 30 July 2020 stated that:

- 9.1 For the smooth implementation of MOD with effect from 12 May 2020, it is very important that variable rates of all Long Term contracted powers are to be received at least three days prior from its effective date to the MSLDC, so that it will be verified, and the monthly MOD stack shall be prepared accordingly. The MOD stack is subjected to revision on submission of latest data and direction of the Commission if any. Being the System Operator for the State, MSLDC has to ensure adherence to Orders issued by the Commission from time to time.
- 9.2 In view of above, MSLDC shall act upon and follow the directives given by the Commission for preparation of MOD stack.

10 JSW, in its replies dated 1 August 2020 raised some of the points which have been already agitated by APML in its replies and further stated that:

- 10.1 The prayers made in the guise of safety, Covid -19 situation and consumer benefits are against the very object of the EA. The generators have offered discounted Tariff for commercial reason and it has nothing to do with the safety issue. The Tariff adopted under Section 63 of the EA cannot be change on ad-hoc and conditional basis and that to specific purpose and/or of convenience. Proposal given in the Petition vitiates the sanctity of PPA executed under Section 63 of the EA as it does not permit revision of Tariff on an adhoc or conditional basis.

- 10.2 NTPC has withdrawn its discount offer. Further, NTPC comes under the jurisdiction of CERC. Hence, the Commission has no jurisdiction to look into such matter and it is wrong on the part of MSEDCL to bring such request before the forum which has no jurisdiction to decide it.
- 10.3 MSEDCL is trying to disturb the settled principle of preparation of MOD stack, which is in force, by submitting that MOD can be revised on the events quoted in its reply and giving reference about the practice followed in other States without filing a separate Petition for this purpose or there is no such pleading in the Petition.
- 10.4 On account of discount offer in MOD rates by RIPL, it is likely that other Generators in the MOD stack may be backed down or they won't get scheduled. There will be financial impact on them. Allowing this kind of Petition means to destroy the settled principles of the Rules and Regulations created under the EA with the aim to bring transparency in procuring power by the State Licensees.
- 10.5 MSEDCL has not given equal opportunity to all players whose coal stock is in excess of the CEA guidelines of coal stock.
- 10.6 It is always the responsibility of the generator to take due care for safety precautions of the coal stock as per the CEA determined norms of the coal stock irrespective of fact that quantity is within limit or exceeding limit as prescribed by the CEA. There is no such precedence available or produced by MSEDCL which is in support to allow the present Petition.
- 10.7 After receiving the queries from the Commission, MSEDCL in its additional submissions has prayed to alter the settled principles of the preparation of the MOD stack which are in operation by this Commission's Daily Order in Case No. 125 of 2016, which is wrong on MSEDCL's part. MSEDCL's contention in additional submission is not ancillary to the relief prayed in its main Petition and afterthought.

11 MSEDCL, in its additional submission dated 4 August 2020 stated that:

- 11.1 The Commission in its draft State Grid Code Regulations has proposed that projected Nth month rates should be considered for the preparation of Nth month MOD Stack for economic load despatch.
- 11.2 Due to consideration of (N-2)th month parameters and seasonal variations, actual change in energy charge rates due to change in coal and transportation charges and taxes and levies thereon etc. are not being reflected in MOD rates. As per methodology, the rates for the summer month are considered in MOD for the rainy months where the demand is low as compared to the summer season demand i.e. the variable rates of May are considered in July MOD. The variation in rates ever goes to the extent of -24% to 30%. Due to such practice of consideration of (N-2)th month parameters, MSEDCL has faced an additional financial burden of Rs. 387.37 Cr. in FY 2018-19 whereas in FY 2019-20, it was Rs. 422.81 Cr.
- 11.3 In case generator doesn't consider the impact of known CIL for projecting / estimating variable charge for MOD stack, the generator ought not be allowed to claim the difference at later stage by getting approval of such CIL, as this may lead to violation of MOD principles and unnecessary burden on end consumers.

- 11.4 Further, the State of Gujarat also follows the principle of real time variable charge rates. MSLDC, Gujarat has updated the MOD stack for the month of July 2020 on four occasions to incorporate the change in fuel cost revealing actual generation cost of the generating stations.
- 11.5 The Commission is requested to allow MSEDCL to obtain, from the contracted generators, projected/ estimated variable rates and consider the same for preparation of MOD stack. The Commission is also requested to permit all the stakeholders / entities concerned including the MSLDC to act on the basis of the actual variable rates of the operating month and to take all necessary and incidental steps for reflecting the same in the MOD stack.

12 GMR, in its replies dated 18 August 2020 stated that:

- 12.1 Considering the fact that relief had been sought by MSEDCL for May and June 2020, the instant Petition has become infructuous as the period for which MSEDCL has sought relief has already expired and therefore nothing remains in the Petition. On account of such efflux of time, nothing wrong/untoward incident has taken place due to the excess coal stock present at the plant site. Hence, the present proceedings have become infructuous.
- 12.2 As held by the Hon'ble Supreme Court in the matter of *J.M. Biswas v. N.K. Bhattacharjee (2002)*, *Shipping Corpn. of India Ltd. v. Machado Bros. and V.C. Varadharaj Vs. Chinnasamy and Ors.*, it is the duty of the Court to take such action as is necessary and which includes disposing of infructuous litigation, as continuing such litigation will be like flogging a dead horse and not benefit any of the parties.
- 12.3 A similar dispensation as raised in present Petition was sought by MSEDCL and RIPL in Case No. 100 of 2017 before the Commission. However, due to efflux of time the said Petition had become infructuous and the same was disposed of as withdrawn vide Order dated 11 April 2018.
- 12.4 MSEDCL through its Additional Submissions on 4 August 2020 has attempted to increase the scope of the present proceedings by seeking a change in methodology for the preparation of MOD on the alleged premise that the same is an economically effective method.
- 12.5 MSEDCL, in its additional submission, has also attempted to amend the reliefs originally sought in its Petition without filing an application seeking an amendment and giving an opportunity to the Respondents to contest such an Application which is again impermissible in law.
- 12.6 It is no longer res integra as held by the Hon'ble Supreme Court in a catena of Judgments; viz. *Peethani Suryanarayana Vs. R V R Kishore, G Nagamma & Ors. Vs. Siromanamma & Anr.* that pleadings cannot be amended so as to alter the nature of the proceedings or materially alters/affect the relief claimed earlier.
- 12.7 Regulation 95 of the CBR Regulations stipulates that before carrying out any amendment to proceedings, an opportunity needs to be provided to the Parties affected by the amendment to provide their objections to the proposed Amendment of proceedings.

12.8 MSEDCL, in an indirect manner through its Additional Submissions is seeking to challenge the settled principles of the preparation of MOD which were formulated under the ABT Order. The Petitioner has not filed any appeal/ Review against the said Order. Therefore, the Order has attained finality. Hence, the indirect challenge to the ABT Order without following the process as envisaged under the EA is nothing but a clever device to do the same indirectly which otherwise cannot be done directly. As held by the Apex Court in the matter of *PratapchandNopaji vs. Kotrike Venkata Setty& Sons*, it is a settled position of law that an act which cannot be done directly may not be done indirectly by engaging other means.

13 AEML-G, in its replies dated 26 August 2020 stated that:

13.1 The principles given in the ABT Order are to be followed consistently for all the generators of the State, as otherwise, adopting a different set of principles selectively for certain generators will affect the MOD position of other generators.

13.2 A uniform mechanism is presently in place, where all the generators are providing the MOD rates based on normative parameters and the actual cost for (N-2)th Month. This mechanism with some minor changes (earlier it was N-1) is in place since the inception of MOD operations in the State. Further, to streamline MOD operations, the Commission has given certain directions through its Daily Order dated 27 October 2016 in Case No. 125 of 2016, wherein all the Generators and MSLDC have reaffirmed this methodology to avoid ambiguity in the MOD operations.

13.3 MSEDCL was aware of these facts and the methodology of MOD as it has always been the party to all the proceedings. However, now it has requested to revise the principle selectively only for it and that too only for a certain period. This will have an impact on all other generators as their position in the MOD stack will get affected.

13.4 Further, it may happen that, if once this selective proposal of MSEDCL is allowed, then in future, generators may use this principle for artificially increasing /decreasing their offtake by manipulating their MOD positions. Therefore, AEML-G has objections to the selective proposal only for the limited period as proposed by MSEDCL and submits that, if at all there is need to review the principles of MOD, then the same shall be undertaken holistically, and implemented prospectively for all times and not just for a limited period.

13.5 Even earlier in Case No 100 of 2017, MSEDCL has itself opposed such a proposal of RIPL for accounting the discount in the MOD stack.

13.6 With regard to considering realistic rates for the nth month, it is submitted that AEML-G has also suggested that the MOD rates should be based on the actual parameters instead of normative parameters, because in case of MOD on normative parameters, the plants which are not performing well get higher off-take and the plants which are performing better than the normative parameters get backed down. In this process, actually the end consumers realize higher power purchase cost as cheaper generation is backed down, while costlier generation is dispatched.

13.7 The Commission needs to take a holistic view of current MOD principles and make modifications to the same so that the dispatch is based on the actual cost of the generator

and not normative cost. While MSEDCL has made similar submissions, but they seem to have been made only for NTPC stations and for a limited period, which cannot be accepted as any change in MOD principles for any one Licensee's generators will affect the MOD position of other Licensees' generators also. Therefore, while it is important to have MOD operation on likely actual variable cost, the principles need to be applied uniformly to all generators, so that more efficient stations are dispatched, while the less efficient ones are backed down. This will ensure overall most optimum cost of power to the end consumers.

14 MSEDCL, in its amendment Application dated 10 September 2020 stated that:

- 14.1 The present Petition was filed on 10 May 2020 and relief was sought for the month of May and June 2020, in respect of discount in variable rates offered by the Generators. The Petition was expected to be listed on or before June 2020. However, the Petition is coming up for admission on 11 September 2020 and therefore, it is necessary and in the interest of justice that the Commission to allow the Petitioner to amend its prayer clause.
- 14.2 MSEDCL had sought relief for May and June 2020 which would have required the Commission to consider various aspects of contractual jurisprudence including the right of the Parties to novate a PPA under the Regulatory regime, the concept of waiver, the regulatory sanction and various other aspects, applicable Regulations to adjudicate the principles and protocol on the basis of which the prayers sought by MSEDCL could be adjudicated. However, as the matter has got listed on 11 September 2020, MSEDCL desires to amend the prayers to consider the various issues raised in the Petition relating to discounts to be granted by the Generators of their own volition and the issue of the N-2 months for consideration of the MOD stack. Hence, MSEDCL is filing the present Application seeking amendment of the Petition.
- 14.3 It would be a travesty of justice, if the various issues raised by MSEDCL in relation to the offer of discount including other consequential and incidental issues like MOD stack, waiver, novation, protocol and methodology of reliance on N-2 month in computation of MOD Stack, amongst other issues are not considered, addressed and adjudicated by the Commission.
- 14.4 The Commission has notified the MERC (State Grid Code) Regulations, 2020 on 2 September 2020 where in the MOD methodology has been modified, however, the date of operationalization of MOD is still not notified.
- 14.5 Hence, the Commission is requested to allow following additional prayers:
- “b1. that this Hon’ble Commission be pleased to issue/devise a protocol for the discounts which can be offered by the Generators to the Distribution licensee under MoD, in a transparent manner;*
- b2. That this Hon’ble Commission may be pleased to reconsider the aspect of “N-2”th month for calculating and preparation of MoD Stack for economic load dispatch and evolve a realistic protocol for preparation of the MoD Stack;*

15 At the e-hearing through video conferencing held on 11 September 2020:

- 15.1 The Advocate for MSEDCL stated:

- i. The present Petition has been filed in May 2020. Subsequently, there were queries from office of the Commission and submissions from the impleaded Parties.
 - ii. Although the prayer in the original Petition was limited for the period of May and June 2020, the principles raised in amended Petition are the same i.e. the discount offered by the generators need to be factored in MOD rates and the MOD stack needs to be prepared, based on projected energy charges for (N)th month instead of (N-2) month as per present practice.
- 15.2 Advocates for the Respondents objected to the amendment and stated that:
- i. In the original Petition, fire safety issue on account of excess coal stock has been raised and citing these grounds, discount in energy charges were offered. Now vide Amendment Application, the scope of the Petition is being enlarged which is not allowed under the law.
- 15.3 In response, Advocate appearing on behalf of MSEDCL stated that:
- i. Under Regulation 103 of State Grid Code Regulations, the Commission has powers to issue practice directions for the implementation of Grid Code Regulations.
 - ii. Original Petition also contains the issues like MOD, discount, (N)th month rate etc. Only prayer in the original Petition did not cover the issues being emphasized in amendment Application.
 - iii. These are just technical objections being raised by the Respondents. Under regulatory proceedings, cases are evolved as the proceeding progresses and therefore the Amendment Application should be allowed by the Commission.
- 15.4 Considering the objections raised by the Respondents on Amendment Application, the Commission directed that next hearing would be held on MSEDCL's Amendment Application and after that hearing in the main Petition would be held.

16 APML, in its replies dated 15 September 2020 on the Amendment Application stated that:

- 16.1 The Petition filed by MSEDCL and the Amendment sought to the Petition have no relevance at this stage because of the following reasons:
- i. With regard to the prayers in Original Petition, APML submits that the context under which RIPL has offered discount and the Petition filed by MSEDCL for approval of such discount have lost its relevance due to efflux of time. The fire hazards cited for offering discount have no relevance now because we are in rainy season.
 - ii. Subsequent to filing of the Petition, the State Grid Code Regulations was notified by the Commission on 2 September 2020 and the MOD procedure is governed by the said Regulations from the date to be notified by the Commission. With regard to the amended prayer of the Petitioner to decide the protocol for considering discount provided by generators in the preparation of MOD stack, the said prayer has to be considered in the light of the State Grid Code Regulations 2020. As the

date of coming into effect of the MOD procedure may be notified by the Commission shortly, it would be appropriate for MSEDCL to take appropriate action in terms of the provisions applicable in the State Grid Code Regulations 2020 and the applicable law.

16.2 In view of the above, Para 3.13 read with Prayer b1 and b2 sought to be incorporated now by the Petitioner travels beyond the scope of the Original Petition and such Amendment Application which seeks to modify the original prayers which were not originally envisaged and hence such amendments ought to be rejected.

17 AEML-G, in its replies dated 15 September 2020 filed identical submission as filed by APML.

18 GMR, in its replies dated 18 September 2020 to the Amendment Application stated that:

18.1 The limited scope of the present proceeding originally initiated by the Petitioner was confined to the issue of fire safety at the plant of RIPL, Discount offered by RIPL for May and June, 2020 and its consequent implementation into MOD.

18.2 By virtue of its Additional Submissions and the Amendment Application, the Petitioner is seeking to increase the scope of the proceedings beyond the fire safety issue to other economic considerations. Same is not permissible in law.

18.3 The averments made by MSEDCL in its Amendment Application are nowhere relatable to the original Petition.

18.4 As held by the Hon'ble Supreme Court in the matter of *M. Revanna v. Anjanamma (Dead) By LRs. & Ors.* and few other Judgments, neither amendment of pleadings can be claimed as a matter of right nor pleadings can be permitted to be amended so as to inter alia alter/enhance the nature of the proceedings, set up a new case.

18.5 The additional reliefs in the Amendment Application, per se, are not only independent of the averments in the original Petition and amounts to raising a new case altogether but such reliefs cannot be granted being beyond the jurisdiction of the Commission.

18.6 The methodology for the preparation of MOD stack has already been enacted by the Commission with the notification of Grid Code Regulations duly notified on 2 September 2020. By way of the additional reliefs, MSEDCL is essentially seeking to challenge the State Grid Code itself, which is beyond the jurisdiction of the Commission.

18.7 The EA does not empower the Commission with the judicial review of the Regulations enacted by it. Such power lies in the exclusive domain of the Courts and not Regulatory Commissions. This has been affirmed by the Hon'ble Supreme Court in *PTC India vs. CERC & Ors.*

18.8 The Petitioner cannot, therefore, be permitted to circumvent the established judicial process, and the Amendment Application if allowed would be travesty of justice and would result in judicial overreach.

18.9 The said Amendment as sought to be carried out by MSEDCL is against the settled law

that pleadings cannot be amended if it alters the nature of the proceedings or materially alters/affect the relief claimed earlier or affect the accrued rights of the Respondents therein. Amendments bring out a completely new cause of action which was not originally envisaged and hence such amendments ought to be rejected.

18.10 The instant Amendment Application is baseless and transcends beyond the scope of power vested under the Commission by Order 6 Rule 17 of the Civil Procedure Code, 1908 and the same ought to be rejected.

19 At the e-hearing through video conferencing held on 4 January 2021:

19.1 Advocate appearing for MSEDCL re-iterated their submissions as made out in the Amendment Application and further stated that:

- i. Initially, the prayers in present Petition were limited to the transaction between RIPL and MSEDCL. Certain queries were raised by the Commission, to which MSEDCL has responded.
- ii. The objective of filing the Amendment Application is to generalize earlier framed RIPL template under original Petition.
- iii. The prayer in the original Petition was seeking approval for consideration of the discount offered by RIPL for preparation of MOD for the month of May and June 2020 whereas the prayer in the Amendment Application is about preparation of a protocol after taking into consideration of the discounts, whenever offered by the Generators to the Distribution licensee under MOD, in a transparent manner. Discount was the main issue in the original Petition, and it remains the issue in the Amendment Application also. Therefore, the scope of the original Petition is not sought to be enlarged as contended by the Respondents, rather in original Petition, the relief, which was sought for a specific case and now, through the amendment Application, a generic relief is being sought on the same issue.
- iv. The Respondent No. 6, in its replies, has relied on the Judgment passed by the Hon'ble Supreme Court in the matter of North Eastern Railway Admn. v. Bhagwan Das which held that amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Both these criteria are satisfied in present case.
- v. The Respondent No. 6 has referred to the Judgment passed by the Hon'ble Supreme Court in the matter of Rejaveetu Developers and Builders vs. Narayanaswamy & Sons & Ors. and stated that pleadings cannot be amended if it alters the nature of the proceedings or materially alters/affect the relief claimed earlier or affect the accrued rights of the Respondents therein. However, no rights have been accrued to the Respondent No. 6.
- vi. As seen from the aforesaid Judgment, amendment may be allowed if refusing amendment would lead to injustice or lead to multiple litigation. Through present Amendment Application, MSEDCL is seeking a general dispensation to avoid the multiple litigations.

- vii. MSEDCL is also not challenging the State Grid Code Regulations and only seeking approval of the Commission for Discount protocol in MOD stack preparation.
 - viii. The Respondents have referred to the Order 6 Rule 17 of the Civil Procedure Code, 1908 while objecting to MSEDCL's Amendment Application, however, the Commission is not bound by CPC and can frame its own procedure based on CPC which have been raised by the Commission through its CBR Regulations. Although the Commission can rely on CPC, it does not fetter the Commission in its functioning.
- 19.2 Representative of MSLDC stated that they had already filed their reply on the Petition and there was no submission from MSLDC on MSEDCL's Amendment Application.
- 19.3 Advocate appearing for RIPL stated that:
- i. In amendment Application, the issue raised by MSEDCL is academic in nature as presently, no generator has offered any discount in its Energy Charges.
 - ii. The original Petition has become infructuous as cause of action no more exists and therefore the Commission may dismiss the Petition and a new Petition needs to be filed by MSEDCL.
- 19.4 Representative of MSPGCL stated that:
- i. MSPGCL had already filed its submission which may be taken on record.
 - ii. The period for which the relief was sought in the original Petition, has already been over. Also, subsequently, the PPA between RIPL and MSEDCL has been amended.
 - iii. With change in circumstances, nothing survives in the matter and therefore the Commission may appropriately decide the Petition.
- 19.5 Representative of APML stated that they have already filed their submission which may be considered by the Commission while deciding the matter.
- 19.6 Advocate appearing for GMR re-iterated their submissions as made out in their reply to Amendment Application and further stated that:
- i. The prayer of discount offered by RIPL for May and June 2020 was the foundation of the Petition, however, as clarified by RIPL itself, the original cause of action does not survive any more. Further residual clauses of Petition cannot be used to enlarge the scope of Petition.
 - ii. The prayer for approving Discount protocol is being requested now which was not there in original Petition.
 - iii. Regulation 33.2 of MERC (State Grid Code) Regulations 2020 has specified the components of energy charges to be considered for MOD stack preparation, however there is no provision for considering any discount offered by the Generating Companies in the Energy Charges for MOD purpose. Since MSEDCL is seeking approval of the Commission for Discount protocol, it amounts to a Petition for amendment of State Grid Code Regulations and thus, it is different

cause of action.

- iv. Further, under Regulation 101, 102 and 103 of the State Grid Code Regulations, the Commission has powers to remove difficulties in the implementation of Regulations, power to relax the Regulations and power to issue practice directions, code and guidelines with regard to implementation of these Regulations which are not invoked by MSEDCL while seeking the amended prayer of specifying Discount protocol.
- v. The Regulation 33 of State Grid Code Regulations doesn't take into account any discount offered by the Generating Station for MOD purpose and through judicial Order, same cannot be added in the Regulations thereby amending the Regulations.
- vi. The prayers in the original Petition and Amendment Application are not relatable. Also, the original Petition has become infructuous due to efflux of time. Hence, the Commission should dismiss the Petition.

19.7 Advocate appearing on behalf of JSW stated that:

- i. Since RIPL has withdrawn its discount proposal, no cause of action exists now. As the Petition has become infructuous, there is no point in allowing the Amendment Application filed by MSEDCL.

19.8 Representatives of TPC-G stated that they have no submissions to make in the matter.

19.9 Representatives of AEML-G stated that they have already filed their submissions and they have nothing to additional to say.

19.10 In response, the advocate appearing for MSEDCL stated that:

- i. All the Respondents are suggesting filing of a separate Petition by MSEDCL. However, MSEDCL, through Amendment Application, is attempting to avoid multiple litigations and MSEDCL is seeking approval of the Discount protocol in a transparent manner which is in interest of the consumers.
- ii. MSEDCL's request for reconsideration of the aspect of "N-2"th month for preparation of MOD Stack has been addressed in the State Grid Code Regulations, however, the Discount in Energy Charges are not factored in the Regulations.
- iii. Responding to the Commission's query that the provision of Discount protocol would require an amendment in the State Grid Code Regulations 2020 which has been recently notified, Advocate for MSEDCL stated that these Regulations do not take into consideration unforeseen situations being faced today and the law needs to be dynamic to take into consideration the prevailing circumstances.
- iv. In spite of provisions in the EA and the corresponding Regulations, the Commission, in past, has issued a separate Wind Tariff Order. In similar lines, the Commission may consider to pass an appropriate Order to facilitate Discount provision as the State Grid Code Regulations do not deal with Discount, waiver etc.

Commission's Analysis and Ruling:

- 20 After going through the submissions of MSEDCL and the Respondents, the Commission notes that the Amendment Application filed by MSEDCL would require to be decided first and the decision on the Amendment Application would decide the outcome of the main Petition.
- 21 In support of its Amendment Application, MSEDCL has stated that although in its original Petition, it had sought relief for May and June 2020, the Commission, for deciding the prayer, would have required to consider various aspects of contractual jurisprudence including the right of the Parties to novate a PPA under the Regulatory regime, the concept of waiver, the regulatory sanction and various other aspects, applicable Regulations etc. MSEDCL has also stated that as the matter got listed only on 11 September 2020 (i.e. after expiry of the period for which the relief had been sought), it desires to amend the prayers to consider the various issues raised in the Petition relating to discounts to be granted by the Generators of their own volition and the issue of the N-2 months for consideration of the MOD stack.
- 22 On the other hand, the Respondents have objected to the Amendment Application of MSEDCL with their main contention being that after filing of original Petition, by way of additional submissions and the Amendment Application, MSEDCL is seeking to enlarge the scope of original Case which is not permissible under the Law.
- 23 As per MSEDCL, although prayers have been revised, the issues to be adjudicated remains the same and therefore scope of the Petition is not sought to be enlarged as contended by the Respondents.
- 24 In light of the above, it is imperative to examine the prayers of original Petition and prayers sought to be added by way of the Amendment Application.
- 25 Following prayers have been made in the original Petition:
- “
- a. *To consider MSEDCL's request for urgent listing of the matter as the MoD for the month of May 2020 is implemented from 12.05.2020 at 00.00 hrs.*
 - b. *To allow MSEDCL to consider discounted rate in variable rates offered by the generators in the generating unit/ stations for preparation MoD for the month of May 2020 and June 2020 or till the level of coal stock of offered Generating unit/station comes to the level specified by CEA norms.”*
- 26 The prayers sought to be added by way of the Amendment Application are as under:
- “b1. that this Hon'ble Commission be pleased to issue/devise a protocol for the discounts which can be offered by the Generators to the Distribution licensee under MoD, in a transparent manner;*
 - b2. That this Hon'ble Commission may be pleased to reconsider the aspect of “N-2”th month for calculating and preparation of MoD Stack for economic load dispatch and evolve a realistic protocol for preparation of the MoD Stack;”*

- 27 Thus, in original Petition, MSEDCL has sought approval for consideration of discount offered by the Generating Stations (only RIPL had offered the discount) in the variable charges for preparation of monthly MOD stack for May and June 2020 whereas through the Amendment Application, MSEDCL has requested to devise the Discount protocol for MOD stack preparation. The Commission notes that in original Petition filed on 10 May 2020, MSEDCL never requested to devise a separate Discount protocol and the emphasis was mainly to mitigate the fire risk at RIPL's Generating Station due to excessive coal stock.
- 28 The Commission further notes that in its original Petition, there is no mention of reconsideration of (N-2) month aspect for preparation of MOD stack and it is only in its additional submission dated 20 May 2020, MSEDCL raised this issue. The Commission is of the view that this (N-2) month aspect is nowhere related to the original Petition and the prayers made therein. Thus, the prayers in original Petition and those sought to be included by way of the Amended Application are different prayers. It is also important to note that at the time of filing of the Amendment Application, the prayers in original Petition had become infructuous due to efflux of time.
- 29 It is also observed that facts and justification narrated by MSEDCL in additional submissions are different from the facts and justification averred in the original Petition. The original Petition was focused on discount offered by RIPL, due to unforeseen situation of crash in MSEDCL's demand and thereby causing the safety hazard issue on account of excessive coal stock at RIPL's Generating Station. In its subsequent additional submission, MSEDCL included new aspect for consideration of latest available rates/ the projected variable rate i.e. "N"th month rate instead of "N-2" month rate and included the justification for the same. Thus, the justifications/circumstances narrated in the subsequent submissions are distinct from those provided in the original Petition. It is pertinent to note that upon receipt of various queries from the Commission on legal basis for consideration of such discounts for MOD stack preparation, MSEDCL raised various issue pertaining to the MOD Principles and suggested to reconsider the same, with a request to devise a separate Discount protocol and to review the "N-2" month aspect.
- 30 Thus, the original Petition was a Petition seeking consideration of discount for MOD purpose without seeking any revision in MOD principles. After receipt of queries, MSEDCL, probably realized that existing MOD principles do not permit such discount and hence through additional submission, while replying to the queries, it raised its concerns about existing MOD principles/methodology and subsequently, through its Amendment Application, it sought to add the prayer seeking modification in MOD principles and approval of separate Discount protocol.
- 31 Hence, the prayers, facts and justification being advanced now in the Amendment Application are totally distinct from the original Petition. The cause of action of filing of original Petition, no more exists. The circumstances have changed, and the urgency and difficulty expressed for mitigating the issues related to fire safety etc. are also not part of the Amendment Application of MSEDCL. Hence, the Commission is of the

view that, a totally new case is sought to be made out by MSEDCL by way of Amendment Application.

32 Further, MSEDCL, itself has admitted that in its original Petition, it had sought specific relief with reference to the discount offered by RIPL and through the Amendment Application, it is seeking generic dispensation. Thus, the fundamental nature of case has been changed from a specific relief to a generic relief seeking to evolve a protocol for treatment of discount as and when same is offered by any generator.

33 The Commission has noted citation of few Judgments highlighted by the Respondents. In its Judgment in the matter of M. Revanna v. Anjanamma & Ors., the Hon'ble Supreme Court held as under:

“5. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order VI Rule 17 of the CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigations, the Court needs to take into consideration whether the application for amendment is bonafide or malafide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money.”

34 Further, in the matter of *Rejaveetu Developers and Builders vs. Narayanaswamy & Sons*, the Hon'ble Supreme Court held as under:

“ 63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bonafide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

35 As mentioned earlier, a totally new case is sought to be made out by MSEDCL by way of Amendment Application and the fundamental nature of case has been changed from a specific relief to a generic relief. In view of the above, the Commission deems is

appropriate to hold that allowing the Amendment Application of MSEDCL would not be appropriate.

36 It is a matter of fact that period for which the prayers were sought in the original Petition (May and June 2020) is over. The context under which RIPL had offered discount and the original Petition was filed by MSEDCL for approval of such discount, have lost its relevance due to efflux of time. Thus, the original Petition has admittedly become infructuous due to efflux of time.

37 Subsequent to filing of the original Petition, the State Grid Code Regulations have been notified by the Commission on 2 September 2020 and the MOD stack preparation is now governed by these Regulations. Vide Order dated 25 September 2020, the principles for MOD stack specified in these Regulation have been operationalized with effect from the month of October 2020.

38 Further, the Commission is of the view that that discount offered by Generating Companies amounts to an amendment to the tariff structure of executed/approved PPAs and such amendments can be carried out by the Parties through a supplemental agreement under the PPA provisions and after the approval of the Commission, the PPA terms and conditions including the Tariff, can be considered as amended tariff. This amended tariff can be considered for MOD stack. Such similar dispensation has already been provided by the Commission vide Order dated 30 December 2020 in Case No. 232 of 2020 wherein it has accorded approval to supplementary PPA entered between MSEDCL and RIPL and reflecting the same under MOD stack.

39 Hence, it would be appropriate for MSEDCL to take appropriate action in terms of the provisions applicable in the State Grid Code Regulations 2020 and the applicable law and if required approach with a fresh Petition with necessary data/details/justification in case, it is of the opinion that revision in the MOD principles would in the interest of consumers.

40 Hence the following Order:

ORDER

1. **Case No. 108 of 2020 is dismissed.**

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I. M. Bohari)
Member**

