

**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](http://www.merc.gov.in)**

**Case No. 12 of 2021**

**Case of Betul Oil Limited seeking declaration that the Short Term Energy Purchase Agreement (EPA) dated 22 July 2020 executed with MSEDCL stands terminated in view of failure of MSEDCL in discharging its obligations.**

**AND**

**MA No. 6 of 2021 in Case No. 12 of 2021**

**Miscellaneous Application seeking urgent ex-parte ad-interim orders directing MSEDCL not to reject the short term open access application dated 9 February 2021 made by Petitioner seeking open access for the month of March, 2021 during the pendency of the main matter**

Betul Oil Ltd.

..... Petitioner

Maharashtra State Electricity Distribution Company Ltd.

..... Respondent

**Coram**

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

**Appearance**

For the Petitioner

: Sh. Roshan Tanna (Adv.)

For the Respondent

: Sh. Ashish Singh (Adv.)

**ORDER**

**Date: 24 March, 2021**

1. Betul Oil Limited (**BOL**) initially filed this Petition on 4 February 2021 under Section under Section 86 (1) (e) and 86 (1) (f) of the Electricity Act, 2003 (**EA**) seeking declaration that Short Term Energy Purchase Agreement (EPA) executed with Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**) stands terminated in view of failure of timely payments by MSEDCL.
2. Subsequently, BOL filed MA No. 6 in Case No. 21 of 2021 on 17 February 2021 seeking urgent ex-parte ad-interim orders directing MSEDCL not to reject the Short Term Open Access (STOA) application dated 9 February 2021 seeking open access for the month of March, 2021 during the pendency of main matter before the Commission.
3. **BOL's main prayers are as follows:**

**Original Prayers in Case No. 12 of 2021**

- a) *Hold and declare that the Energy Purchase Agreement (EPA) dated 22.07.2020 executed between Petitioner and MSEDCL stands terminated with immediate effect from 21.01.2021, i.e. expiry of 7 days from the date of service of the Notice Intimating Termination dated 14.01.2021;*
- b) *Direct MSEDCL to immediately discharge its obligations towards outstanding dues accrued till the date of termination of Short Term Energy Purchase Agreement ("EPA") dated 22.07.2020 executed between Petitioner and MSEDCL;*
- c) *Hold and declare that the outstanding dues accrued till the date of termination of Short Term Energy Purchase Agreement ("EPA") dated 22.07.2020 executed between Petitioner and MSEDCL shall be paid by MSEDCL along with DPC @ 15% per annum*

4. **BOL in its Case has stated as follows:**

- 4.1. BOL owns and operates a Wind Turbine with an installed capacity of 1.25 MW, located at District- Nandurbar, Maharashtra. The said wind turbine was commissioned on 6 February 2006.
- 4.2. On 22 July 2020, BOL entered into a Short Term EPA with MSEDCL. The term of the EPA dated 22 July 2020 was from 1 July 2020 to 30 June 2021.
- 4.3. In accordance with the terms of the EPA, BOL started supplying power to MSEDCL, which has been utilized by MSEDCL. It is pertinent to note that MSEDCL has sold the said power injected by BOL to its consumers and has also recovered money from its consumers.

- 4.4. BOL started raising monthly bills/invoices, however, MSEDCL started to default in making timely payments of the bill/invoices which led to a precarious financial situation of BOL. The details of the bills/invoices not yet paid by MSEDCL are as under:

<b>S.No</b>	<b>Invoice No.</b>	<b>Invoice Date</b>	<b>Amount (Rs.)</b>
<b>1.</b>	Bill No.2019/20/03a/Sb-49	24 Sep. 2020	8,82,007.00
<b>2.</b>	Bill No.2020/21/06/K420	26 Oct. 2020	2,73,046.00
<b>3.</b>	Bill No.2020/21/07/K420	12 Nov. 2020	1,96,561.00

- 4.5. BOL issued a Termination Notice to MSEDCL dated 14 January 2021 demanding clearing of all outstanding dues along with carrying cost at 15% per annum within a period of seven (7) days from the date of the notice, failing which the EPA dated 22 July 2020 would stand terminated. MSEDCL has neither cured its continuing defaults nor has it responded to the “Notice Intimating Termination” dated 14 January 2021.
- 4.6. BOL has discharge all its obligations of supplying power to MSEDCL in a timely manner, as stipulated under the EPA. Hence, it cannot be fastened with an EPA of which MSEDCL has no intention to perform its obligations in a timely manner.
- 4.7. The Commission in the past has allowed termination of EPA when MSEDCL has failed to discharge its basic and express obligation under the EPA. Hence, justice and equity demands that similar treatment is awarded to BOL in the present case.
- 4.8. The Commission in plethora of past Orders has directed MSEDCL to pay the outstanding dues under the EPA with Delayed Payment Charges (DPC). Hence, similar treatment needs to be awarded to BOL in the present case.

5. **On 17 February 2021, BOL filed an MA No. 6 of 2021 with following prayer:**

**Prayers under MA No. 6 of 2021**

- a) *Pass urgent ex-parte ad-interim orders directing MSEDCL not to reject the short term open access application dated 09.02.2021 made by Petitioner seeking open access for the month of March 2021 during the pendency of main matter filed by the Petitioner before this Hon’ble Commission, on the ground that the Energy Purchase Agreement (EPA) dated 22.07.2020 executed between Petitioner and MSEDCL is valid and subsisting; and/or alternatively,*

- b) *Pass urgent ex-parte ad-interim orders holding and declaring that MSEDCL would be obliged to allow open access for the month of March, 2021 in all eventualities without there being any embargo of timelines as per DOAR, 2016, in case, this Hon'ble Commission allows the main matter filed by the Petitioner;*

**6. BOL in its MA No. 6 of 2021 filed under Case No. 12 of 2021 submitted as below:**

- 6.1. During the pendency of the Main matter, BOL preferred to make a STOA application on 10 February 2021 to MSEDCL seeking open access for the month of March, 2021.
- 6.2. BOL apprehends that MSEDCL would mechanically reject the STOA application, which would lead to unavoidable circumstances which has already occasioned in Case No. 83 of 2018.
- 6.3. During the pendency of Case No. 83 of 2018 (Ghatge Patil Industries Limited Vs. MSEDCL), MSEDCL had rejected the open access application dated 5 June 2018 made for the month of July 2018 on pretext that the EPA was valid and subsisting.
- 6.4. MSEDCL took a stand that the time frame for making the open access application as per the DOAR, 2016 for the month of July 2018 was already over on 10 June 2018 and the application for the month of July 2018 made on 5 June 2018 already stood rejected before the passing of the Order dated 2 July 2018 in Case No. 83 of 2018. Hence the open access permission cannot be granted for the month of July 2018.
- 6.5. BOL apprehends that MSEDCL would take the same position in respect to the present Petition as well. This position of MSEDCL, if allowed, would lead to wastage of BOL's power for the month of March, 2021 as it would be denied its legitimate right of availing open access merely on procedural formalities, and that too on a defense/stand of MSEDCL which would be nullified by the Order of the Commission in the main matter, in case, the Commission allows the Petition of BOL.

**7. BOL made the submission dated 25 February 2021 in MA No. 6 of 2021 in Case No. 12 of 2021 given as under:**

- 7.1. With reference to the STOA application, MSEDCL by its email dated 18 February 2021 has informed as under:

*“With reference to the above mentioned subject, please note that the generation location K-420 (Generator: M/s Betul Oil Ltd.) in r/o the above mentioned SOA application (ID:*

12489) is into Short Term Power Purchase Agreement (EPS) with Request ID: 102095 and Agreement IS: 1000008538 from 01.07.2020 to 30.06.2021 as confirmed from RE section. In view of this, the above mentioned STOA application (ID: 12489) can not be considered for March 2021.”

**8. MSEDCL in its reply dated 25 February 2021 made the following submissions:**

8.1. BOL’s Long Term EPA with MSEDCL expired on 5 February 2019 and MSEDCL has already released all Long term dues till date of expiry of PPA.

8.2. MSEDCL had closed the short term portal during December 2019, however, considering the situation arising on account of COVID-19 pandemic, for convenience of the small wind generators and to prevent their losses due to idle positions of their projects, MSEDCL started short term portal and contracted such wind capacity, from March 2020. BOL is one of the generators which took the benefits of such facilitation provided by MSEDCL.

8.3. Status of outstanding dues as per petitioner and MSEDCL is as follow:

As per BOL				As per MSEDCL			
Generation Month	Invoice Submission Date	Due date	Amount (In Rs. Crs.)	Generation Month	Due date	Amount (In Rs. Crs.)	Remark
Jun-19	22.01.2021	22.03.2021	0.09	Jun-19	22.03.2021	0.09	Not Due
Sep-20	29.10.2020	29.12.2020	0.03	Sep-20	29.12.2020	0.03	MSEDCL already Paid on 11.01.2021
Oct-20	17.11.2020	17.01.2021	0.02	Oct-20	17.01.2021	0.02	MSEDCL already Paid on 18.01.2021
Nov-20	29.01.2021	29.03.2021	0.01	Nov-20	29.03.2021	0.01	Not Due
<b>Total Principal Claim</b>			<b>0.15</b>			<b>0.15</b>	

8.4. BOL had executed Short Term PPA with MSEDCL for the period from 3 February 2019 to 2 June 2019, 3 June 2019 to 2 September 2019, 3 September 2019 to 31 December 2019 and 1 January 2020 to 30 June 2020. Further, BOL has entered into Short Term PPA on 22 July 2020 with MSEDCL for period from 1 July 2020 to 31 June 2021.

8.5. As per terms and conditions of the PPA dated 22 July 2020, termination Clause is reproduced below:

*“7. Termination clause:*

*MSEDCL hereby reserves the entire rights of voluntary termination before the stipulated period, on giving the prior notice of 24 hrs. to that effect. Apart from this voluntary termination, MSEDCL reserves its right to terminate this Agreement, if the seller fails to supply the contracted quantum of the Energy within stipulated period; or fails to perform the contract to the satisfaction of the “Procurer”, or fails to adhere/abide by the terms & conditions of this agreement / any prevailing provisions of Law/any MSEDCL"s guidelines etc. provided a prior notice of at least 7 days be given.*

Also, PPA does not have any provisions with regard to event of defaults as claimed by BOL and also does not have any Clauses related to Delay Payment Surcharge.

8.6. Since, February 2019, BOL has been in short term agreement with MSEDCL after signing of PPAs on four occasions, therefore, BOL, at this stage cannot change the PPA Clauses conveniently and cannot rely on imaginary changes in PPA clauses.

8.7. As far as the issue of delay payment is concerned, MSEDCL has made payment regularly, except for three occasions mentioned below:

<b>Year</b>	<b>Due Date</b>	<b>Payment Date</b>	<b>Delay in days</b>	<b>Amount Paid</b>	<b>Remark</b>
Mar-19	9/29/2019	11/19/2019	51	304,837.00	Delay on account of transition stage from manual billing to Online Non-Conventional Energy (NCE) Billing portal
Apr-19	11/16/2019	11/16/2019	0	555,581.00	
May-19	1/25/2020	1/27/2020	2	1,057,250.00	
Aug-19	1/14/2020	1/14/2020	0	679,746.00	
Sep-19	7/14/2020	7/17/2020	3	359,843.00	
Oct-19	2/7/2020	2/7/2020	0	124,862.00	
Nov-19	2/14/2020	2/14/2020	0	60,587.00	
Dec-19	7/14/2020	7/17/2020	3	76,122.00	
Jan-20	4/27/2020	5/28/2020	31	154,465.00	During lockdown payment get delayed
Feb-20	7/14/2020	7/17/2020	3	107,894.00	
Mar-20	7/14/2020	7/17/2020	3	309,838.00	
Apr-20	7/14/2020	7/17/2020	3	373,627.00	
Jun-20	9/19/2020	9/22/2020	3	292,382.00	
Jul-20	10/15/2020	10/16/2020	1	276,515.00	
Aug-20	11/21/2020	11/24/2020	3	518,860.00	

Year	Due Date	Payment Date	Delay in days	Amount Paid	Remark
Sep-20	12/5/2019	12/5/2019	0	99,455.00	
Sep-20	12/29/2020	1/11/2021	13	273,046.00	NCE Portal was under modification for incorporating mandated Tax collected at Source (TCS) facility
Oct-20	1/17/2021	1/18/2021	1	196,561.00	
Jun-19	3/22/2021	Not Due	-	882007.00	
Nov-20	3/29/2021	Not Due	-	70055.00	

From the above, it can be seen that MSEDCL has paid the dues to BOL in timely manner and therefore petitioner cannot ask for the cancellation of PPA on such grounds. Thus, the claim of BOL for termination of Short Term PPA is devoid of merit and needs to be rejected .

8.8. After existing short term PPA period gets over, BOL is free to opt for any other option for sale of electricity from its plant. Till then, it has to fulfil its obligation under the existing PPA, which cannot be terminated without mutual agreement with MSEDCL and further when there is no reason or grievances.

8.9. It is a settled position of law that courts cannot override or rewrite or amend or modify the terms of a contract entered between the parties. The terms of a contract mirror the intent of the parties which existed while entering into such contract, and such terms cannot be modified or altered through direction from the court, unless mutually agreed between the parties. Few of the judgments passed by the Hon'ble Supreme Court in support of this contentions are mentioned below.

A. Judgment dated 28.01.2020 in the matter of Shree Ambica Medical Stores and Others Vs. Surat People's Co-operative Bank Limited and Others.

*“21. The court through its interpretative process cannot rewrite or create a new contract between the parties. **The court has to simply apply the terms and conditions of the agreement as agreed between the parties.**” (emphasis added)*

B. Judgment dated 23.09.1993 in the matter of Union Territory of Pondicherry and Others Vs. P. V. Sureah and Others.

*“11. In the circumstances of this case, our inquiry is limited to the question whether the contract was so constructed that the loss was inherent and implicit in it; if so, it*

*ought to be modified. Otherwise, the court has no jurisdiction to alter the terms or rewrite the contract between the parties.” (emphasis added)*

- 8.10. Further, at the time of application for short term sale to MSEDCL, BOL submitted an Undertaking regarding not opting for open access for the period of short term sale to MSEDCL. Thus, after making an application for short term sale, executing a PPA for sale of power to MSEDCL under short term and at a later stage asking for termination of this PPA is contradictory to the BOL's own commitment and is clearly an afterthought. Thus BOL's request is devoid of merit and deserves to be rejected summarily. It is to note here that MSEDCL has already informed BOL the non-consideration of its short term application for March-21 vide email dated 18 February 2021.
- 8.11. MSEDCL further submits that, the Case referred by BOL i.e. Case No. 83 of 2018 is not relevant in the present matter as the circumstances in the Case No. 83 of 2018 and the present matter are totally different. In present matter, MSEDCL is making timely payment to BOL barring exceptional events. Thus, the reference of said Commission's Order dated 2 July 2018 with the present case will not be valid.
- 8.12. BOL in its Petition has claimed that MSEDCL has sold the power to the consumers supplied by it and has also recovered the money for the said power from its consumer. In this regard, it is submitted that:
- a. The delay in payment of Wind Generators is basically due to low recovery (around 7%) from agriculture consumers although it covers 30% sale of MSEDCL. Due to this MSEDCL is not in a position to release payment to RE generators within due date and hence the payment gets delayed. 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 only very little provision for bad debts in spite of having largest consumer base and rural area covered which has a lower possibility of timely payment..
  - b. MSEDCL is going through financial crisis due to COVID-19 Pandemic. With the restrictions in force, the MSEDCL is not in a position to recover the dues from its consumers in time and it will result in further worsening of the cash flows of MSEDCL and in turn it will be difficult for MSEDCL to adhere to payment schedules.
- 8.13. BOL has submitted the present Petition under Section 86 (1) (e) and Section 86 (1) (e) of the EA, however, the present matter cannot be assumed as a dispute. Therefore, the Petition is liable to be dismissed.



9. At the e-hearing through video conferencing held on 26 February 2021, the representative of BOL and MSEDCL reiterated their submission in the Petition. The representative of BOL submitted that MSEDCL, by its email dated 18 February 2021 has rejected its application for open access for the month of March 2021 and impressed upon Prayer 'b' of its MA in order to allow it the open access for the month of March 2021 without any embargo of timelines as per Distribution Open Access Regulation 2016.

### **Commission's Analysis and Rulings**

10. BOL owns and operates wind turbine of 1.25 MW capacity located at District – Nandurbar, Maharashtra. Initially it had a Long-Term EPA with MSEDCL which expired on 5 February 2019. Subsequently, it entered into a Short-Term EPA dated 22 July 2020 with MSEDCL for the period from 1 July 2020 to 30 June 2021.
11. BOL in its main Petition has submitted that MSEDCL has been regularly defaulting on payments which led to its precarious financial situation and has requested to declare that the its Short-term EPA with MSEDCL stood terminated. Further, it has requested to direct MSEDCL to clear all dues along with the DPC.
12. Subsequently, on 10 February 2021, BOL made a STOA application to MSEDCL seeking Open Access for the month of March 2021. Thereafter, on 17 February 2021, BOL filed MA No. 6 of 2021 in the present matter apprehending that MSEDCL may reject its STOA application during the pendency of the present matter and sought Commission's direction to MSEDCL not to reject its STOA application for the month of March.
13. In reply, MSEDCL has contended that barring few occasions, it has made regular payment to BOL. MSEDCL, in its submission, has provided the payment details from March 2019 till November 2020. MSEDCL further contends that as per the terms of EPA/PPA there is no provision with regards to the event of default as claimed by BOL. The right to Terminate the EPA is solely with MSEDCL. Further, BOL had submitted an undertaking of not opting for open access during the period of short term EPA with MSEDCL.
14. The Commission notes that Short-Term EPA under dispute is for the period of 1 July 2020 to 30 June 2021. BOL has claimed termination of EPA on the alleged ground of non-payment of electricity bills by MSEDCL within due dates. From the records submitted by MSEDCL (summarized in para 8.7 above), it is observed that MSEDCL has been making payments with a delay of 1 to 3 days from due dates during the period of short-term EPA except 13 days delay in the month of September 2020. MSEDCL has provided justification for such 13 days delay i.e. its portal was under modification for incorporating mandated Tax collected at Source (TCS) facility. Thus, by and large MSEDCL has been making timely payments to BOL .

Delay of 1 to 3 days cannot be treated as a major default necessitating the termination of EPA more so with reference to the terms of the EPA.

15. It is also important to note that Covid-19 pandemic is a Force Majeure event which has affected all sectors of economy including BOL and MSEDCL. In order to absorb RE energy through valid short-term contract, MSEDCL provided option to RE Generators through their web portal to sell their unutilized power to MSEDCL. Such facility provided by MSEDCL even though its consumer demand was drastically reduced during lockdown period has helped RE generators to sell their surplus energy and earn some revenue. Under such circumstances, proposing termination of EPA due to delay of 1 to 3 days in making payment by MSEDCL is not appropriate. BOL needs to consider the fact that revenue collection of MSEDCL has also reduced drastically during this period of pandemic and even then MSEDCL is making payment of their dues around due date.
16. The Commission notes the circumstances under which the EPA was signed. BOL has opted to sign this EPA after expiry of its long-term EPA. It is important to note that earlier Long-term EPA had clause which stipulates that refusal by either party to perform its material obligations under the Agreement would be treated as immediate event of default and may lead to termination of EPA. Whereas in present Short-Term EPA, both parties have agreed upon following clause relating to termination of EPA:

*“MSEDCL hereby reserves the entire rights of voluntary termination before the stipulated period, on giving the prior notice of 24 hrs. to that effect. Apart from this voluntary termination, MSEDCL reserves its right to terminate this Agreement, if the seller fails to supply the contracted quantum of the Energy within stipulated period; or fails to perform the contract to the satisfaction of the “Procurer”, or fails to adhere/abide by the terms & conditions of this agreement / any prevailing provisions of Law/any MSEDCL's guidelines etc. provided a prior notice of at least 7 days be given”*

BOL had not only accepted the provisions of the contract which allows only MSEDCL to terminate the EPA, but had also signed an undertaking for not opting for Open Access during the contractual period. Thus, the Commission rules that BOL is legally bound by the Contract.

17. The Commission also notes that though the EPA provisions do not permit termination of EPA on the grounds of delay in payment by MSEDCL, MSEDCL is also bound by the agreement of making timely payments. Though the Commission is aware of the financial difficulties of MSEDCL in this pandemic period, MSEDCL is directed to make the outstanding payments (if any) within 15 days of this order.

18. As prayer for termination of short-term EPA is rejected, issue of granting Open Access does not arise. Hence, same is also rejected.

19. Hence, the following Order:

**ORDER**

1. Case No. 12 of 2021 and MA No. 6 of 2021 is partially accepted.
2. The termination of EPA and grant of OA is rejected.
3. MSEDCL is directed to make the outstanding payments, if any, within 15 days from the date of this order.

Sd/-  
(Mukesh Khullar)  
Member

Sd/-  
(I.M. Bohari)  
Member

