

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. 228 of 2020

Case of Sai Wardha Power Generation Limited seeking directions to Maharashtra Electricity Distribution Company Limited for purchase/procurement of additional power in terms of the judgment of the Appellate tribunal for electricity dated 10 February, 2015 in Appeal no. 70 of 2013.

Coram
Sanjay Kumar, Chairperson
I.M.Bohari, Member
Mukesh Khullar, Member

Sai Wardha Power Generation Limited Petitioner
Vs	
Maharashtra State Electricity Distribution Company LtdRespondent No 1
RattanIndia power Limited NashikRespondent No 2

Appearance

For Petitioner: -Shri .Anand Ganeshan (Adv.)
For Respondent no 1:-Smt Deepa Chavan (Sr.Adv.)
For Respondent No 2:-Shri Venkatesh (Adv.)

ORDER

Date: 3 May, 2021

1. Sai Wardha Power Generation Limited (**SWPGL**) has filed this Case on 9 December, 2020 under Section 86(1)(b)(f) of the Electricity Act, 2003(**EA,2003**) seeking directions to Maharashtra Electricity Distribution Company Limited (**MSEDCL**) for purchase/procurement of additional power in terms of the judgment of the Appellate tribunal for electricity (**APTEL**) dated 10 February, 2015 in Appeal No. 70 of 2013 as further upheld by the Hon'ble Supreme Court of India vide its judgment dated 10 May, 2018 in Civil Appeal No. 5731/2015.

2. **SWPGL's main prayers are as under:**

- a) Hold and direct that upon the failure of RPL Nasik to supply power as per the approval granted, the Petitioner is entitled to supply additional power of 140MW (total 310MW) to MSEDCL immediately and 100 MW after 4 years, in terms of the Judgment of the Appellate Tribunal for Electricity dated 10.02.2015 in Appeal No. 70 of 2013 as further upheld by the Hon'ble Supreme Court vide its judgment dated 10.05.2018 in Civil Appeal No. 5731/2015;*

3. **SWPGL in its Petition has stated as follows:**

- 3.1 Pursuant to Ministry of Power (**MoP**) guidelines dated 18 May 2009, MSEDCL had issued a request for proposal for procurement of 2000 MW (+30%-20%) for a period of 25 years on long term basis and the Commission by its Order in Case No. 22 of 2010 dated 28 December, 2010 adopted levelised tariff for procurement of power pursuant to the bidding. Further the Commission in its Order in Case No. 56 of 2010 had approved the further purchase of 125 MW of power by MSEDCL from Adani Power Maharashtra Limited (**APML**) at the same terms and conditions under special circumstances. SWPGL was one of the qualified bidders in this Process.
- 3.2 MSEDCL filed the Petition in Case No. 53 of 2012 before this Commission for approval of the Power Purchase Agreements (**PPA**) initiated with APML (440 MW) and RattanIndia Power Limited (**RPL**) (650 MW) for long term procurement of additional quantum of 1090 MW. The Commission by its Order in Case No. 53 of 2012 dated 27 December, 2012, adopted the tariff and approved the procurement of 1090 MW of power from RPL Nasik and APML.
- 3.3 Aggrieved by the above Order, SWPGL filed an appeal before the APTEL in Appeal No. 70 of 2013. By Order dated 10 February, 2015, the APTEL allowed the Appeal No. 70 of 2013 and inter-alia, directed that the capacity of 1090 MW ought to be procured from APML, RPL and SWPGL in proportion of their offered capacity to 1090 MW, so as to exhaust the 1090 MW. The APTEL further held that in case any of the other parties do not offer power on the said tariff of Rs. 3.280/- per unit, SWPGL could supply power so long the 1090 MW is not exhausted.
- 3.4 Pursuant to the above Judgment, SWPGL at that stage vide communication dated 20 February, 2015 had offered capacity of 310 MW, from its generating station to MSEDCL on the same tariff and terms and conditions as that of APML. The above offer was also based on the fact that RPL had offered to supply 650 MW and the capacity was to be pro-rated by the parties. There was no representation at that stage either by RPL or by MSEDCL that RPL would not be supplying power to MSEDCL.
- 3.5 On 10 March, 2015, MSEDCL issued a letter to the RPL and the Petitioner directing it to submit an unconditional offer for supply of power along with details of quantum at

the matching levelised tariff of Rs. 3.28 per kWh. On 18 March, 2015, SWPGL offered to supply 310 MW of power to MSEDCL at a tariff of Rs. 3.28 MW.

- 3.6 On 18 May, 2015, APTEL dismissed the Review Petition filed by RPL against the Order dated 10 February 2015. The APTEL Order was challenged by RPL and Hon'ble Supreme Court by its Order dated 10 May, 2018 dismissed the Civil Appeal 5478 & 5731 of 2015.
- 3.7 In the proceedings for the consequential directions pursuant to APTEL Judgment, the Commission by its Order dated 19 January, 2019 reallocated the power as under and held that rate of procurement would be 3.28 Rs./kWh:

Seller	Earlier Allocation (MW)	Quantum offer subsequent to ATE Judgment		Revised quantum on pro-rata basis
		MW	%	
APML	440	440	31	343
RPL	650	650	46	507
SWPGL	-	310	22	240
Total	1090	1400	100	1090

While, the above allocation had been done in terms of the direction of APTEL for pro-rating the based on quantum offered, the Commission further directed that the PPA of APML for 440 MW needs to be revisited for reduction in contracted capacity to 343 MW and, such reduction should be effectuated once PPAs are executed by the MSEDCL and RPL and SWPGL.

- 3.8 MSEDCL was aware of the fact that if RPL Nasik was not going to offer its share of power, the remaining quantum would have to be offered to the other participants i.e. APML and SWPGL.
- 3.9 Pursuant to APTEL Judgment in Appeal No. 50 of 2019 dated 11 March, 2020 the Commission vide order dated 15 June, 2020 in Case No. 91 of 2020 approved conditional procurement of 240MW power from SWPGL.
- 3.10 Subsequently, SWPGL proceeded to complete the PPA formalities etc., and furnished a contract performance guarantee to MSEDCL and executed the PPA with MSEDCL on 2 July, 2020 for the capacity of 240 MW, which was on the basis of supply by APML, RPL and SWPGL on a pro-rata basis. The supply of the capacity has commenced from 4 July, 2020. The capacity of 240 MW was given to SWPGL on the basis that the entire capacity of 1090 MW was exhausted with the three generators.
- 3.11 In the above background, on 14 September, 2020, SWPGL wrote a letter to MSEDCL stating that as RPL has not even come forward to sign a PPA with MSEDCL for any quantity therefore, in terms of the directions of the APTEL, SWPGL is entitled to offer

and supply higher capacity, subject only to the restriction that the total capacity of 1090 MW is not exhausted.

3.12 RPL Nashik after making an offer in 2015 for supply of 650MW power at Rs. 3.28/Unit, has not come forward to sign the PPA, or make any efforts to honour its offer to supply, even after 5 years. It is now evident that RPL has not signed the PPA as yet and consequently is not in a position to supply power and therefore the capacity has to be offered to SWPGL.

3.13 SWPGL offered to supply the entire balance plant capacity of 170MW (over and above 310MW) to MSEDCL under the same terms and conditions of the existing PPA on long term basis. In the original bid in the year 2009, SWPGL had in fact offered 675 MW.

3.14 MSEDCL vide communication dated 13 November, 2020, has rejected the offer of the SWPGL with respect to the balance capacity of its plant, but has in fact also denied SWPGL even for the capacity of 310 MW, which in any case SWPGL is entitled to contract in terms of the directions of the APTEL. MSEDCL has taken a position that it is not obliged to procure more than 240MW from SWPGL. This decision is contrary to the clear directions of the APTEL and the Commission.

3.15 MSEDCL in its communication has primarily based its denial on the following grounds:

- a. That in terms of the directions of the Appellate Tribunal in Appeal No. 70 of 2013, a fresh competitive bidding process is to be initiated by MSEDCL for balance power, in case RPL Nasik offers less than 650MW power.
- b. That the intention behind procurement of 1090 MW power was demand supply gap prevailing and envisaged at that time, around 8 years back, and that currently MSEDCL is in power surplus scenario.

3.16 The issue of fresh competitive bidding as raised by MSEDCL, only comes into the picture if there is any balance capacity left after taking the quantum offered by the qualified bidders, over and above 1090 MW. In the present case, the total quantity offered by APML and SWPGL is much less than 1090 MW. SWPGL is in a position to supply 380 MW with immediate effect and 100 MW after a period of 4 years. SWPGL's plant capacity is 540 MW and is presently supplying 100 MW to BEST under a medium-term arrangement, which will terminate on 28 February, 2025.

3.17 Therefore, the capacity of 820MW (440MW of APML + 380MW of SWPGL) would be exhausted at present and the capacity of 920 MW (440 of APML and 480 of the Petitioner) would get exhausted after 4 years. This would be also corresponding to the demand of MSEDCL for power and also within the already approved quantum of 1090 MW for which the procurement process was undertaken. Only for the balance quantity of 170MW (1090MW – 920MW), MSEDCL may be entitled to initiate fresh bidding (if at all).

3.18 The contention of MSEDCL that *No requirement of additional power by MSEDCL in current scenario* is contrary to the directions of the APTEL. The procurement of additional power of 1090MW stands already approved by the Commission and the said power is intended to be procured under long-term contracts, and therefore, the present situation of power surplus in Maharashtra is wholly irrelevant for the purpose of contracting power up to the said 1090MW.

3.19 Further, the absurdity in the contention of MSEDCL is evident from the fact that in case RPL Nashik came forward to supply its share of power, MSEDCL would be bound to accept the same in terms of the consequential Order dated 19 January, 2019 passed by the Commission in Case No. 53 of 2012.

3.20 In view of the above, it is submitted that to the extent of the already approved 1090MW, MSEDCL bound to procure power from the qualified bidders, in terms of the Judgment of APTEL, and the consequential Order dated 19 January, 2019 of the Commission.

4. MSEDCL in its submission dated 15 January 2021 has stated as follows:

4.1 The APTEL judgment dated 10 February, 2015 relates to the competitive bidding undertaken by MSEDCL 10 years back in 2010. This bidding process involved various entities and also entailed pro-rata procurement of power by MSEDCL pursuant to the Orders passed in the said litigation. As such, other bidders and entities who were part of the process are necessary parties and ought to have been impleaded by SWPGL. The Petition ought to be rejected at threshold for non-joinder of necessary parties.

4.2 The impugned Order of the Commission dated 27 December, 2012 in Case no. 53 of 2012 and APTEL judgement dated 10 February, 2015 in Appeal No. 70 of 2013 is premised on completely different circumstances. It addresses the situations as prevalent at the then relevant time and therefore, cautioned the stakeholders rightly in using the same as a precedent.

4.3 The APTEL has specifically dealt with the process in selecting the bidders for additional power rather than considering the action of the State Commission in approving the additional quantum of 1090 MW which is said to be in order “due to some exigencies” as indicated by the State Commission at that time. APTEL in its judgment has clearly mandated that the findings in the Appeal should not be treated as a precedent.

4.4 The present scenario being completely different, including in respect of the reduced prices of various other sources of power as against the exigencies, that were contemplated and considered by the State Commission in its order dated 27 December, 2012 in Case No. 53 of 2012 and thereafter, considered by the APTEL in its judgment dated 10 February, 2015, do not exist at present.

- 4.5 During the year 2011-12, thermal power was a cheaper option compared with Renewable Power such as solar and wind. However, in the present scenario, the rates of long term renewable power are considerably reduced and renewable power is the cheaper power at present. Rate of solar power is reducing day by day as a result of introduction of new technologies. In the recent bidding conducted by Solar Energy Corporation of India (**SECI**) for Gujarat Urja Vikas Nigam Limited (**GUVNL**), the rates of solar power are discovered as low as Rs.1.99 per unit. Further, the average rate of power purchase through energy exchange is around Rs.3.00 per unit.
- 4.6 Therefore, MSEDCL has different options of sourcing and procuring cheaper power from Renewable sources as the rates for renewable power contracted by MSEDCL at present are less than Rs. 2.70 per unit and the same are expected to reduce in the future considering technological advancements.
- 4.7 The APTEL judgment cannot be read to obviate and render nugatory Section 61 of the Act. The judgment cannot be said to dilute the right of MSEDCL to procure cheaper power if available presently, ignoring the present scenario and subject the consumers of the State to higher cost of power. The judgment also cannot be read to ignore power surplus scenario faced by the MSEDCL. MSEDCL has placed various reliance of Hon Supreme Court Judgments in this regard.
- 4.8 The power offered by SWPGL at the levelled rate of Rs.3.28 per unit will further include impact of different change in law on account of taxes and duties (around 45 paise at present) and impact of Flue Gas Desulfurization (**FGD**) installation in future. The resultant cost of SWPGL power will be very high compared to the present renewable rates and will result in very high burden ultimately on consumers.
- 4.9 MSEDCL does not agree with the interpretation of APTEL judgment by SWPGL. MSEDCL in conformity is obligated only to procure 240 MW power from SWPGL and reserves its right to issue fresh bids for the balance power. MSEDCL was to procure power on the basis of pro – rata allocation of 343 MW from APM, 507 MW from RPL and 240 MW from SWPGL as per the said Judgment, in light of the exigencies then prevalent.
- 4.10 APTEL has also indisputably held that in case, IBRL-Nashik (RPL) and SWPGL do not offer power on long term basis at levelized tariff of Rs. 3.28 per kWh, the balance power of 650 MW (over and above the quantum of 440 MW already approved) has to be procured through fresh competitive bidding process only.
- 4.11 Therefore, as clearly held by APTEL that in the present situation, even in case RPL fails to execute PPA with MSEDCL as alleged by SWPGL, the balance power has to be procured through fresh competitive process only. Hence, MSEDCL in any case is not obligated to procure power more than 240 MW from SWPGL in any condition.

- 4.12 The Commission and the APTEL have clearly indicated that the core intention behind procurement of 1090 MW power was to meet demand supply gap prevailing and envisaged at that time i.e. during the year 2012 which is about 8 years back in a fair and proper manner.
- 4.13 However, as on date MSEDCL has contracted 26564 MW capacity of conventional power and 10939 MW of non-conventional power peak demand for MSEDCL has reached to the level of 21570 MW and the total thermal contracted capacity is considerably more compared to the demand. Further, capacity addition plan of around 2233 MW from Central and State Genco was already approved, and the capacity is expected to be commissioned by FY 2024-25
- 4.14 The Government of Maharashtra has taken a conscious decision on 17 June, 2020 that there will be no capacity addition for thermal power plant for next 5 years considering current scenario of RPO obligation of 16% for the year 2020-21 and increase in Renewable Purchase Obligation (RPO) upto 25% for the year 2024-25.
- 4.15 These subsequent events cannot be ignored to treat the APTEL judgment dated 10 February 2015 as a judicial fiat which is perennial. The judgment dated 10 February 2015 stands complied with and worked out once the pro rata procurement was undertaken. The judgment is not a binding precedent for subsequent changed scenarios.
- 4.16 MSEDCL being a body authorized by the State of Maharashtra is always obligated to safeguard the financial interests of its consumers. It is the practice of the MSEDCL to avail low cost power from the bidder. MSEDCL goes through a strenuous process of procuring its power so that end- consumers do not have an undue financial burden. It is the MSEDCL's duty to give electricity at an affordable tariff and the tariff quoted by SWPGL is higher compared to other available sources. It is always the custom to serve the best for the citizens, in that line of thought MSEDCL has the liberty to obtain offers for the power requirement. This would create a fair distribution of opportunity in the market of electricity power production. Accordingly, various options of buying cheaper power are available for MSEDCL.

5. SWPGL in its rejoinder dated 28 January 2021 has stated as follows:

- 5.1 The issue raised by SWPGL is for implementation of the same Order of the APTEL dated 10 February, 2015 which is binding on the parties to the decision. MSEDCL has not given any legal justification whatsoever for not implementing the said decision. It is now not open to MSEDCL to justify its actions of violating the decision of the APTEL and refusing to implement the same.
- 5.2 The issue before the APTEL was only the allocation of 1090 MW among the 3 generators, which has now attained finality. There is no question of impleading any other generator at this stage, when the reliefs sought is only qua MSEDCL.

- 5.3 As has been upheld by the APTEL the quantum of 1090 MW is to be procured from the 3 generators, in terms of the directions given by the APTEL. It is now evident that only 2 of the generators are in a position to supply electricity and therefore in terms of the directions given by the APTEL, SWPGL is entitled to supply the quantum as offered and mentioned in the present petition. The total quantum of 1090 MW is not fully exhausted and therefore it is obligatory on the part of MSEDCL to procure the quantum as offered by SWPGL in the present petition.
- 5.4 The APTEL has also specifically directed that in case one generator does not offer electricity on the terms as mentioned, the electricity shall be procured from the other generators without any pro rata reduction in capacity.
- 5.5 The contention on power procurement scenario having been changed is also completely misconceived. This is also established by the fact that in case RPL is in a position to supply electricity, there can obviously be no defence taken by MSEDCL for non-procurement.
- 5.6 Thermal generators provide base load power as compared to renewable energy sources which are infirm in nature and are must run generating stations. The power procurement planning is considering the base load generating stations and therefore there cannot be one-to-one comparison between thermal generating stations and renewable generating station for power procurement planning.
- 5.7 MSEDCL did not object to or otherwise challenge the approval given by the Commission in the Order dated 15 June, 2020 to the full extent of 1090 MW, even in the proceedings before the APTEL in Appeal No. 50 of 2019, it was the specific averment of MSEDCL that it required additional power over and above 1090 MW which could be procured from Adani Power at the same tariff terms and conditions. Considering the above, the contentions now sought to be raised to not procure capacity even up to 1090 MW and seeking to avoid the implementation of the direction contained in the Order dated 10 February, 2015 of the APTEL is grossly misconceived, contemptuous and is liable to be rejected.
- 5.8 APTEL in its judgment dated 2 February, 2018, in Appeal No. 235 of 2015 and Appeal No. 191 of 2015 held that it was not open to the licensees or the State Commission to reduce the total procurement quantum once the same was approved, and bids had been invited on that basis. It is submitted that the principle upheld by the APTEL in the above matter squarely applies to the present case, where MSEDCL is essentially seeking to now reduce the total procurement quantum to much below 1090MW.

6. SWPGL in its additional submission dated 3 March, 2021 has stated as follows:

- 6.1 As per APTEL Judgment if one of the generators does not offer power, the power shall be proportionate to the other two generators on the quantum offered by them as long as the capacity of 1090MW is not exhausted. It is only for the balance capacity after

exhausting the offers from the three generators that the power can be procured by MSEDCL through a fresh process.

6.2 The Hon'ble Supreme Court in its judgment in *Civil Appeal No. 3481-3482 of 2018* dated 25 April, 2018 has upheld the APTEL decision that the capacity once approved and gone through the process of procurement cannot be subsequently reduced. This decision of the Hon'ble Supreme Court applies squarely to the present case. MSEDCL cannot be permitted to resile from procuring the capacity of 1090 MW in aggregate from the three generators.

6.3 MSEDCL is seeking to compare the long-term power supply by SWPGL to the short-term power available in the market or otherwise power available from renewable energy sources. Short-term power sources can never be the point of comparison for power planning and procurement from long-term sources. The short-term market by its inherent nature is very volatile and cannot be relied on for power planning and procurement for a long-term horizon.

6.4 Similarly, the availability of power from renewable energy sources, particularly wind and solar can never be compared to base load requirements or power available from conventional generators. On the contrary, having higher capacity base of solar or wind generators itself would require procurement of higher capacity from conventional energy generators to manage the load and to meet the base load requirements.

6.5 Also, in the proceedings before the Commission leading to the Order dated 19 January, 2019, MSEDCL had itself contended that it requires power on long term basis and that MSEDCL was in fact forced to meet the shortfall by procuring from short-term market, which has in fact reached high prices of up to Rs 18 per unit during peak hours and more than Rs 8.95 per unit on round-the-clock basis. Further, MSEDCL had also stated that the tariff in the present case was much less and the long-term PPA signed with other thermal generators and is therefore beneficial to the consumers.

7. At the time of E-hearing held on 26 March, 2020:

7.1 Advocate of RPL raised the issue that SWPGL has filed the contingent or conditional Petition which depends on the supply of power from RPL to MSEDCL as per APTEL Judgment. He stated that on the background that RPL has filed the case with the Commission as Case No 23 of 2021 for adjudication about cancellation of LOA, the case of SWPGL which is interlinked with the supply of RPL to MSEDCL might be heard after Case No 23 of 2021 which is scheduled for hearing on 30 April, 2021.

7.2 Advocate of SWPGL opposed the contention and stated that he has not been made necessary party in Case No 23 of 2021 which is filed in the month of March, 2021 much after the present case had been filed. Advocate of MSEDCL also supported the stand of SWPGL and stated that the Petition filed by SWPGL is on implementation of APTEL Judgment and the petition filed by RPL is on cancellation of LoI, different from each

other, and need to be heard separately. Considering the views and acknowledging the difference in the prayers of the two matters, the Commission decided to complete the proceedings in the present matter of SWPGL.

Advocate of Petitioner:

7.3 Advocate of the Petitioner reiterated the submission made in the Petition. He further stated that as per APTEL Judgment dated 10 February, 2015, procurement of 1090 MW approved by the Commission in 2012 pursuant to competitive bidding carried out in 2009-10 is binding on MSEDCL. Further, as RPL is not in a position to execute PPA with MSEDCL and supply power after lapse of 8 years from 2012, the 1090 MW capacity required to be distributed among the remaining two successful bidders. As APML has exhausted its capacity, remaining capacity should be allotted to SWPGL. Further, SWPGL is in a position to supply immediately 140 MW and remaining 100 MW after expiry of the contract with the BEST and that the offered supply is well within the quantum of 1090 MW. SWPGL is pressing its right to supply power to MSEDCL as per APTEL judgment if other bidder fails to supply the same within relevant period of time which is squarely falling under Para 53 of the Judgment.

Advocate of MSEDCL:

7.4 Advocate of MSEDCL reiterating the submission made in the Petition has stated that APTEL has passed its judgment in Appeal No 70 of 2013 dated 10 February, 2015 based on the factual matrix that the SWPGL has not offered opportunity in participating in the power procurement of 1090 MW by MSEDCL. Further the procurement was based on the anticipated shortfall in the future years based on the scenarios in FY 2009-10 and the APTEL has acknowledged the same as exigency situations and upheld the decision of the Commission for procurement of 1090 MW power in the interest of consumers. As per the directives of the APTEL, PPA was signed between MSEDCL and SWPGL and also the process for signing PPA was started between RPL and MSEDCL. Thus, the APTEL Order is implemented. The judgment of APTEL has transpired as a statute and not the replacement of Section 63 of EA, 2003. Further Para 53 of APTEL judgment cannot be read in isolated manner but needs to be read in consonance with the background of the case.

7.5 The differences between MSEDCL and RPL in signing PPAs are the subsequent events and not to be correlated with the APTEL Order. Further APTEL in its judgment has not unequivocally directed MSEDCL for procurement of power from the selected bidders but it has directed to carry out fresh bidding in the interest of the consumers. The scenarios anticipated at that time were different and the demand supply gap in the current position is reversed. Further Renewable power rates are drastically reducing in long term and further Section 61 of EA, 2003 necessitates to consider the commercial principles in the interest of consumers before any procurement of power.

Advocate of RPL:

7.6 Advocate of RPL stated that SWPGL has filed the contingent or conditional Petition which depends on the supply of power from RPL to MSEDCL as per APTEL Judgment. The process of executing PPA between RPL and MSEDCL has been started in 2019 after the Orders of the Apex court in the litigations filed by RPL. Further RPL has filed the Petition before the Commission for adjudication of the dispute about cancellation of LOI which is not the matter of fact of this Petition and is the subsequent event happened after the implementation of the APTEL Judgment by the Commission. Therefore, the contention of SWPGL, that RPL is not in a position to supply power and thereby its right to supply balance power, is premature.

7.7 Further the Commission while implementing the APTEL Judgment, in its Order has stated that the readiness of RPL for executing PPA is the matter between MSEDCL and RPL and this part was not challenged in the Apex court and has attained finality.

7.8 Further the Para 53 referred by SWPGL from APTEL judgment cannot be read in isolation but should be in consonance with the facts and factual of the Case. Further though SWPGL was the successful bidder in 1090 MW power procurement, the dispute relating to signing of PPA is between the two parties i.e RPL and MSEDCL and it is not required to include SWPGL as a Respondent in that Petition.

8. MSEDCL in its supplementary submission dated 9 April, 2021 has stated as follows:

8.1 MSEDCL in the submissions before APTEL in Appeal filed by APML had requested for restoration of 440 MW quantum of APML and submitted that either the quantum for other generators be revised considering maturity of the PPA or additional power of 97 MW may be approved which is being a meagre quantum in the background of the fact of maturity of PPA with APML. APTEL vide its judgment dated 11 March 2020 in Appeal no 50 of 2019 restored the quantum of 440 MW for APML.

8.2 The Commission vide its Order dated 15 June, 2020 has directed MSEDCL to approach Commission for approval of 97 MW power within 6 months considering the factors relating to the demand supply scenario. Presently, due to COVID, the demand scenario in the state has changed considerably. MSEDCL is in process of forecasting demand for future period considering all the factors affecting demand projection in the future period, as a best possible endeavour, particularly considering the constantly changing scenario.

8.3 MSEDCL is also in the process of studying and finalizing the optimum power mix in the further period considering the limitations of RE power and the developments and evolution in the sector in view of future technologies.

8.4 Finalization of all these aforesaid aspects will take some time. It is these circumstances, that MSEDCL has presently not approached the Commission for the additional 97 MW

power. MSEDCL will approach the Commission for additional power, if the situation so warrants.

9. RPL in its supplementary submission dated 12 April, 2021 has stated as follows:

9.1 SWPGL has erroneously stated that RPL has not come forward to sign the PPA with MSEDCL and is not in a position to supply power. In this regard it is stated that on 30 April, 2019, MSEDCL issued the Letter of Intent for procurement of 507 MW of power from RPL at a levellised tariff of Rs 3.280/ kWh. Subsequently, RPL has invoked remedies available to it in law to ensure that power supply is effected from its plant. The said issue is sub-judice before the Commission. Even otherwise the alleged inability of RPL to supply power to MSEDCL does not grant any rights in favour of SWPGL to demand mandatory off take of additional power.

9.2 The observations of the APTEL at Paragraph 53 of the Judgment dated 10 February, 2015 passed by the APTEL are to be understood after considering the underlying facts and circumstances. The same do not vest any statutory right upon SWPGL to demand mandatory off take of additional quantum of power.

9.3 It is trite law that words and expressions used in a Judgment cannot be read as the words and expressions of a statute. Further, the reasoning adopted in a Judgment is meant to cover adjudication of dispute between the parties therein and may not be used in all cases brought before the court. The reasoning adopted by a court of law in a Judgment can only be deciphered by perusing the facts and circumstances of the case.

9.4 The Commission, vide its Order dated 19 January, 2019 in Case No. 53 of 2012, has granted liberty to MSEDCL to discuss / verify with RPL its preparedness to supply power. Thereafter the Commission allocated the quantum of 1090 MW of power between APML (343 MW), RPL (507 MW) and SWPGL (240 MW). The observations of the Commission at Paragraph 26 and 27 of the Order dated 19 January, 2019 do not mandate that additional power is to be procured from SWPGL in case RPL is unable to supply its allocated share. The said findings of the Commission were never challenged by SWPGL, and the same have attained finality qua SWPGL.

9.5 In view of the above, it is submitted that the instant Petition filed by SWPGL is wholly without merit and is liable to be dismissed by the Commission.

10. SWGPL in its supplementary submission dated 14 April, 2021 has stated as follows:-

10.1 SWPGL has stated that petition filed by RPL before the Commission is completely different and it is invoking Section 23 and 86(1) (b) and seeking withdrawal of the termination of the LoI. SWPGL is entitled to be served with a copy of the Petition to become aware of its contents and the implications on its rights, particularly when the said petition is being used as a defence by RPL to the claims made by the SWPGL

- 10.2 The present petition needs to be adjudicated on the basis that RPL is not in a position to execute the PPA as per the approval of the Commission dated 27 December, 2012 and directed by the APTEL vide judgment dated 10 February, 2015 as upheld by the Hon'ble Supreme Court. This position has continued since 2012 till date without any change in the facts, MSEDCL had however only delayed consequential action being taken.
- 10.3 If MSEDCL had taken action against RPL and also disclosed the fact that RPL was not in a position to act in terms of the APTEL's Order dated 10 February, 2015, SWGPL was obviously entitled to the capacity as sought for in the present petition.
- 10.4 Procurement of 1090MW stood approved by the Commission vide its order dated 27 December, 2012. It was only the allocation of the quantum which was under challenge. Therefore, the quantum of 1090MW had attained finality at that stage itself. Moreover, the procurement was for 25 years. Therefore, to the extent of procuring 1090MW for 25 years, the same cannot be sought to be reduced by MSEDCL at this stage.
- 10.5 APTEL, inter-alia, directed that the capacity of 1090 MW ought to be procured from APML, RPL and the Petitioner in proportion of their offered capacity to 1090 MW, so as to exhaust the 1090 MW.
- 10.6 It is evident from the fact that in case RPL Nashik came forward to supply its share of power, MSEDCL would be bound to accept the same in terms of the consequential Order dated 19 January, 2019 passed by the Commission in Case no. 53 of 2012.
- 10.7 Pursuant to the above judgment, SWPGL at that stage had offered capacity of 310 MW. It may be relevant to take note that the offer of 310 MW was made presuming that RPL was also in a position to supply. In the original bid in the year 2009, SWPGL had in fact offered 675 MW. Therefore, to the extent of procurement of 1090 MW, there can be no objection of MSEDCL.
- 10.8 APTEL in the order dated 10 February, 2015 only set aside the manner of selection of the generators to supply the 1090 MW. However, by the present submissions, MSEDCL and also RPL are seeking to go behind the procurement of 1090 MW itself, which is misplaced.
- 10.9 In Appeal No. 50 of 2019 before the APTEL, MSEDCL filed a specific affidavit stating that it required additional 97 MW over and above 1090 MW, and therefore the full capacity of APML may be approved. It is not open to MSEDCL at this stage to now contend that the capacity of 1090 MW itself is not required.
- 10.10 Further, the question of requirement of additional 97 MW and the obligation to procure the same is also settled by the APTEL in the judgment dated 11 March, 2020 in Appeal No. 50 of 2013. APTEL has only given liberty to the other Respondents (apart from MSEDCL) to approach the Commission for allocation of the said capacity.

10.11 As on date factually the LoI of RPL has been cancelled by MSEDCL (though belatedly), and RPL is not entitled to supply power under the bidding process of 2012.

10.12 MSEDCL had issued the termination notice of the LoI to RPL on 19 May, 2020. This was not even disclosed to the Commission prior to the passing of the order dated 15.06.2020. If the said fact had been disclosed by MSEDCL, even in the order dated 15.06.2020, the Petitioner would have been entitled to the full capacity as claimed and at least to the extent of 310 MW.

10.13 It is not the position that RPL has entered into the PPA and supplied power, but the PPA has subsequently failed for some reason. The fact is that RPL was never in a position to execute the PPA and supply power, right from 2012. The said position has only been belatedly acknowledged and acted upon by MSEDCL.

10.14 Contention of RPL that the LoI was issued for the first time to RPL in 2019 and steps are being taken by RPL for securing the capacity under the LoI is ex-facie erroneous. Firstly, the approval for execution of PPA for RPL was on 27 December, 2012. RPL has been dragging its feet and has failed to execute the PPA for the past 9 years.

Commission's Analysis and Ruling:

11. The Commission notes that SWPGL has relied upon ATEL Judgment dated 10 February 2015 for seeking relief in present matter. Hence, it is important to summarise events which led to ATEL Judgment dated 10 February 2015 and subsequent orders of Supreme Court and this Commission. Accordingly, important events in the present matters are summarised below:

11.1 Vide its Order dated 23 July, 2009, the Commission had allowed MSEDCL to initiate competitive bidding process for procurement of 2000 MW Long Term power (Case-I bidding) under Section 63 of the EA, 2003. In that process, MSEDCL received following qualified bids:

Sr. No.	Name of Bidding Company	Capacity Offered (MW)	Levelized Tariff (Rs/kWh)
1	Emco Energy Ltd	200	2.879
2	RPL (Amravati)	1200	3.260
3	APML	1200	3.280
4	RPL (Nasik)	950	3.450
5	Wardha Power Company Ltd	675	3.620

11.2 As bidding process allowed contracting of capacity in the range of -20%/+30% of bided capacity, the Commission vide its Order dated 28 December 2010 adopted the following tariff discovered through competitive bidding process for 2600 MW (+30% of 2000 MW):

Sr. No.	Bidder	Successful Bidder	Capacity Offered (MW)	Levelized Tariff (Rs/kWh)
1	Emco Energy Ltd	L1	200	2.879
2	RPL (Amravati)	L2	1200	3.260
3	APML	L3	1200	3.280

11.3 The Commission vide its Order dated 19 May 2011 had also approved, 125 MW additional power from APML (as a special case since quantum of power was less) at a tariff rate of Rs. 3.28 per unit.

11.4 In the year 2012, MSEDCL proposed to procure another 1090 MW from the RPL Nashik (650 MW) and APML (440 MW). The Commission vide its Order dated 27 December, 2012 in Case No. 53 of 2012 had approved such power procurement from RPL Nashik at Rs. 3.42/kWh and from APML at Rs. 3.28/kWh with following justification:

“44.7. Based on the demand-supply analysis carried out by MSEDCL, it has projected a shortfall of 1,447 MW in FY 2017-18 and the projected shortfall is expected to increase to 6,434 by FY 2019-20.

.....

44.14. The Commission notes that even though the current Petition is based on the bidding process carried out by MSEDCL following the Competitive Bidding Guidelines issued by Government of India under section 63 of the Electricity Act, 2003, the process initiated in 2009 was complete with the adoption of Tariffs for the proposed procurement of 2600 MW under that process. The Commission as a special case approved 125 MW procurement as outlined above considering the fact the quantum of procurement was only 125 MW and it would not have been prudent to carry out a bid process for such small quantum of procurement.

.....

44.15. The proposed procurement relies on the Tariffs discovered in the said Competitive Bidding Process carried out for arriving at the Tariffs.....

.....

49.7 The Commission observes that if the projects from which power procurement has been proposed by MSEDCL are not able to tie up power under long-term PPA, these projects may lose the linkage coal. If the coal linkage is lost, the projects will have to depend on imported coal for power generation.

49.8. In such a scenario, there is a possibility that these projects, which have been set-up under the GoM's policy for promoting investment in power generation, may not be able to contract power in long-term at all or may sign long-term PPAs with States other than Maharashtra. The Commission notes that in such a scenario, the benefits of these projects set up under the Government of Maharashtra policy, which have utilised the natural resources of Maharashtra, may accrue to other States. The Commission also notes that this may impact future private investment in power generation sector in the State.

56. Based on the above analysis the Commission rules as under:

a) The Commission approves the demand-supply gap of 1090 MW for MSEDCL at this stage. Further, MSEDCL is directed to submit its comprehensive long term demand-supply forecast for the Commission's approval;

b) The Commission approves the 1090 MW quantum of power procurement for MSEDCL from IBRL & APML (650 MW from IBRL-Nashik and 440 MW from APML) and adopts the following levellised Tariff for above mentioned power procurement: IBRL-Nashik – Rs. 3.42 per kWh (Levellised Tariff) APML – Rs. 3.28 per kWh (Levellised Tariff).” [emphasis added]

- 11.5 Aggrieved by above Order of the Commission, SWPGL filed an Appeal before APTEL in Appeal No. 70 of 2013. While disposing of Application for Stay (IA No. 112 of 2013) filed by SWPGL, APTEL in its Daily Order dated 22 March, 2013 has ruled as follows:

“Though we are not inclined to grant stay of the operation of the impugned Order, we make it clear that during the pendency of the Appeal, any action taken by any of the parties will be at the risk of those parties and the same shall be subject to the outcome of this Appeal.”[emphasis added]

- 11.6 Vide its Judgment dated 10 February, 2015, the APTEL remanded this matter to the Commission with following findings:

“43. However, in the present case the procurement of additional power has been proposed from the qualified bidders in the competitive bidding process for 2000 MW \pm 30 %/-20% bidding process conducted in FY 2009-10 and completed in December 2010.

.....

44. The standard bidding guidelines of Government of India provided for deviation for the guidelines with the approval of the State Commission. The RFP issued under the competitive bidding process permits additional procurement beyond the specified quantum with the approval of the State Commission. This deviation in quantum of power could have been exercised at the time of procurement of power in the year 2010. However, due to certain developments as described in the impugned order a shortfall in availability of power is anticipated in the FY 2017-18 to the extent to 1447 MW which is likely to increase to 6434 MW in FY 2019-20. Thus, approval for procurement of additional quantum of 1090 MW power by the State Commission is in order. The question arises whether procurement of additional power of 1090 MW, about 42% of 2600 MW power procurement approved under the bidding process, can be allowed by the State Commission against the earlier bidding process.

..

49. *The State Commission under Section 86(1)(b) of the Act has powers to regulate the procurement of power by the distribution licensee. **The approval for procurement of additional quantum of power for 1090 MW for meeting the anticipated shortfall in supply due to some exigencies as indicated in the impugned order by the State Commission is, therefore, in order.** The Appellant here is mainly aggrieved by the process in selecting the bidders for additional power without providing him an opportunity even though it was a qualified bidder in the earlier bidding process. Therefore, in the present context we are only concerned about the process followed by the State Commission in selecting the successful bidders for supply of additional power of 1090 MW. **In the circumstances of the present case, we do not want to interfere with the decision of the State Commission for procurement of additional 1090 MW against the competitive bidding process for 2600 MW power conducted in FY 2009-10 and approved by the order dated 28.12.2010, to meet the projected shortfall in power supply in the State in the interest of consumers.** However, we have to examine the procedure adopted in selecting the bidders for supply of additional power and the tariff approved for the same.*

.....

52. *Thus, the highest tariff which was adopted by the State Commission by its order dated 28.12.2010 was Rs. 3.280 per kWh. The other two lower bidders whose tariff was adopted by the State Commission had declined to offer additional power. We find that the additional procurement of 440 MW approved by the State Commission from M/s. AMPL is also at Rs. 3.280 per kWh i.e. the same rate at which the approval was granted by the State Commission by order dated 28.12.2010. **We feel that the State Commission should have directed MSEDCL to give opportunity to all other qualified bidders viz. M/s. IBRL-Nashik and the Appellant to match the price of Rs. 3.280 per kWh at which procurement of power was approved by the State Commission in its earlier approval dated 28.12.2010. Allowing procurement of power at any rate higher than the rate of Rs. 3.280 (levellised) which was adopted and approved by order dated 28.12.2010 after following the competitive bidding process under Section 63 would not be permissible.** It was not open to the State Commission to accept the negotiated tariff with IBRL-Nashik at a tariff which was higher than the tariff approved after completion of the competitive bidding under Section 63 of the Act. **The competitive bidding process conducted in the year 2009-10 was completed with the approval of procurement of 2600 MW at the price discovered in the bidding process. If some additional procurement has to be made after approval of the State Commission it has to be at the price which was earlier discovered in the competitive bidding and approved by the State Commission by order dated 28.12.2010.** Admittedly M/s. Emco Energy Ltd. (L1) and M/s. IBPL-Amravati (L2) had expressed inability to supply additional power. M/s. APML (L3) have offered to supply 440 MW at Rs. 3.280 per kWh (levellised) i.e. the same tariff which was approved by the State Commission by the order dated 28.12.2010. Therefore, IBRL-Nashik and the Appellant, the other successful bidders (L4 and L5 respectively) should have been given an*

opportunity to match the price of Rs. 3.280 per kWh (levellised) offered by APML which was earlier approved by the State Commission by its order dated 28.12.2010. It was not correct for the State Commission to have adopted a tariff of Rs. 3.420 per kWh for procurement from the Respondent no.3 which was agreed after negotiations without giving an opportunity to the Appellant to match the tariff with the lowest offer.

53. Accordingly, we direct MSEDCL to approach IBRL-Nashik and the Appellant who were the qualified bidders to give their offers for long term supply matching the levellised tariff of Rs. 3.280 per kWh. In case both IBRL-Nashik and the Appellant are able to offer matching the tariff of Rs. 3.280 (levellised), additional procurement of power (1090 MW) shall be approved by the State Commission amongst M/s. APML, IBRL-Nashik and the Appellant on pro-rata basis on the quantum offered by them i.e. in the ratio of 440 MW, 650 MW and the quantum offered by the Appellant on long term basis respectively. If the Appellant is not prepared to offer any power at Rs. 3.280 per kWh and IBRL-Nashik is prepared to offer power at Rs. 3.280 per kWh levellised than the power procurement shall be approved from APML and IBRL-Nashik for 440 MW and 650 MW respectively. If IBRL-Nashik offers less than 650 MW at the tariff of Rs.3.28 per kWh (levellised) then the power will be allocated amongst APML, IBRL-Nashik and the Appellant in the ratio of 440 MW and the quantum in MW offered by IBRL-Nashik and the Appellant respectively and for balance power, if any, fresh procurement process shall be initiated by MSEDCL. In case IBRL-Nashik and the Appellant do not agree to offer power on long term basis at levellised tariff of Rs. 3.280 per kWh, MSEDCL would take action for procurement of balance 650 MW (over and above 440 MW already approved in the impugned order for procurement from M/s. APML at Rs. 3.28 per kWh – levellised) through a fresh competitive bidding process.

54. In view of above, the Appeal is allowed and the State Commission's order is set aside to the extent indicated above. The State Commission is directed to pass consequential order as per the above directions. No order as to costs."
[emphasis added]

Thus, through above judgment, APTEL has remanded the matter to the Commission with following observations/ rulings:

- a. The State Commission under Section 86(1) (b) of the Act has powers to regulate the procurement of power by the distribution licensee. The approval for procurement of additional quantum of power for 1090 MW for meeting the anticipated shortfall in supply due to some exigencies as indicated in the order by the State Commission is, therefore, in order.
- b. RPL-Nashik and the SWPGL should have been given an opportunity to match the price of Rs. 3.280/kWh (levellised) offered by APML which was earlier

approved by the State Commission by its order dated 28 December, 2010. It was not correct for the State Commission to have adopted a tariff of Rs. 3.420/kWh for procurement from the RPL-Nashik which was agreed after negotiations without giving an opportunity to SWPGL to match the tariff with the lowest offer.

- c. APTEL directed MSEDCL to approach RPL-Nashik and the SWPGL who were the qualified bidders to give their offers for long term supply matching the levelled tariff of Rs. 3.280/kWh. In case both RPL-Nashik and the Appellant are able to offer matching the tariff of Rs. 3.280 (levelled), additional procurement of power (1090 MW) shall be approved by the State Commission amongst APML, RPL-Nashik and the SWPGL on pro-rata basis on the quantum offered by them i.e. in the ratio of 440 MW, 650 MW and the quantum offered by the SWPGL on long term basis, respectively.

11.7 RPL filed review of above judgment of the APTEL contending that SWPGL in its bid had offered power from its Chhattisgarh plant and not from Maharashtra Plant. APTEL vide its Judgment dated 13 May 2015 in RP No. 18 of 2015 ruled as follows:

- a. Source of Power being offered by SWPGL were never argued before the APTEL.
- b. As State Commission had already initiated proceedings on APTEL judgment dated 10 February 2015, State Commission shall decide the issue of source of power being offered by SWPGL as per law.

11.8 RPL challenged APTEL Order dated 10 February 2015 in Supreme Court. Said judgment of APTEL was initially stayed by the Supreme Court, however through judgment dated 18 May, 2018 Supreme Court dismissed the Appeal filed by RPL thereby upholding the APTEL Judgment.

11.9 In remand proceeding, the Commission issued Order dated 19 January, 2019 with following ruling:

- a. SWPGL is allowed to source power from its power plant located at Maharashtra instead of Chhattisgarh mentioned in the bid as there is no financial implication of such change of location. Further, power from Maharashtra plant was to be made available within 2-3 months vis-à-vis 2 year's period for Chhattisgarh plant.
- b. 1090 MW of power was reallocated amongst the qualified bidders as per principles laid down in APTEL Judgment dated 10 February 2015 as follows:

Seller	Earlier Allocation (MW)	Quantum offer subsequent to ATE Judgment		Revised quantum on pro-rata basis (MW)
		MW	%	
APML	440	440	31	343
RPL	650	650	46	507
SWPGL	-	310	22	240
Total	1090	1400	100	1090

c. Rate of power procurement will be Rs. 3.280 / kWh (levellised) at Maharashtra STU periphery as per APML's bid for 1200 MW under 2000 MW bidding. 25 year Tariff stream identical to APML's 1200 MW bid should be used for signing of PPA.

d. APML's existing PPA of 440 MW needs to be revised for reduced contracted capacity of 343 MW. However, till power supply from RPL gets commenced, APML is allowed to continue with 440 MW PPA.

11.10 APML challenged reduction in its PPA Capacity before APTEL. Vide its judgment dated 11 March, 2020, APTEL allowed the appeal and restored APML's PPA to 440 MW as follows:

“18. What follows from the facts as stated above and the Affidavit of the 3rd Respondent is that except the Appellant there was no concluded contract so far as other generators i.e, Rattan India Power Limited and Wardha Power Company Limited are concerned. They are still in the process of either approaching the Commission for approval of PPA or for consideration of approval of PPA. So far as the Appellant is concerned, though the quantum is approved by MERC in terms of impugned order, now in the light of Respondent No.3 seeking procurement of additional power of 97 MW, the proposed quantum so far as the Appellant is concerned comes back to 440 MW for which already Power Purchase Agreement (PPA) is in place. Therefore, we set aside the impugned order so far as it restricts the quantum of power on prorata basis vis-a-vis the Appellant Adani Power Maharashtra Limited Thiroda to 343. We approve the request of the 3rd Respondent to procure additional power which restores back quantum of power of 440 MW originally agreed between the parties in terms of approved PPA.

19. So far as other respondent is concerned, it shall proceed to request the MERC to proceed on the request of MSEDCL, which requires procurement of additional power of 97 MW.

20. With the above observations, we allow the appeal so far as the Appellant is concerned permitting/approving additional power requirement of MSEDCL for supply of 440 MWs from APML Tiroda in terms of PPA, which is already in existence.”

Thus, based on MSEDCL's submission that it is seeking additional procurement of 97 MW, APTEL has allowed MSEDCL's request of additional power and using that additional power of 97 MW, restored the capacity of APML from 343 MW to 440 MW. With such additional 97 MW, total power to be procured should have become 1187 MW (1090 + 97). However, in para 19 of the judgment, APTEL directed other respondents i.e. SWPGL and RPL to support request of MSEDCL for procurement of additional power of 97 MW before the Commission. This para 19 of the APTEL judgment suggests that total quantum of power to be procured is still 1090 MW and it will become 1187 MW once the Commission approves MSEDCL's request for procurement of additional power of 97 MW.

- 11.11 Subsequent to above judgment of APTEL, MSEDCL has filed Petition in Case No. 91 of 2020 for adoption and approval of 210 MW [reduced from 240 MW in view of increased capacity of APML as per APTEL judgment] PPA with SWPGL. The Commission vide its Order dated 15 June, 2020 has approved PPA between MSEDCL and SWPGL with following conditions:
- a. Contracted capacity should be 240 MW with condition that it shall stand reduced to 210 MW once RPL, Nashik commences its power supply or will not be so reduced if MSEDCL gets due approval for additional procurement of 97 MW of power.
- 11.12 Subsequent to above Order, MSEDCL and SWPGL have signed PPA dated 2 July, 2020 and scheduling of power started from 3 July, 2020. Thus, as against 310 MW of power offered by SWPGL, as per current PPA, SWPGL is able to schedule 240 MW of power.
12. In the present Petition, by relying upon APTEL Judgment dated 10 February, 2015, SWPGL is requesting for direction to MSEDCL for procuring additional power from its plants for alleged inability of RPL Nashik to supply allocated power quantum. MSEDCL has opposed such request of SWPGL and stated that said APTEL Judgment cannot be relied upon in present circumstances wherein MSEDCL already has surplus power. RPL Nashik has also opposed such request of SWPGL and stated that its plant is ready and issues relating to signing of PPA are pending for adjudication of this Commission.
13. Considering chronology of events elaborated above and submissions made by parties in the matter, the Commission frames following issues for its considerations:
- a. Whether SWPGL can rely upon APTEL Judgment dated 10 February, 2015 for requesting additional quantum of PPA?

- b. Whether MSEDCL be directed to sign additional power procurement contract with SWPGL based on bidding process conducted in 2010?

The Commission is addressing these issues in the following paragraphs.

14. Issue A: Whether SWPGL can rely upon APTEL Judgment dated 10 February 2015 for requesting additional quantum of PPA?

- 14.1 SWPGL by relying upon para 53 of the APTEL Judgment dated 10 February, 2015 has contended that 1090 MW capacity needs to be allocated amongst three bidders viz. APML, RPL Nashik and SWPGL in proportion to capacity offered by them. SWPGL has submitted that since 2012, RPL Nashik has not yet signed the PPA with MSEDCL which clearly demonstrates its inability to supply power. Hence, SWPGL has requested the Commission to allow additional procurement of power from its 540 MW plant for fulfilling shortfall created by RPL Nashik, within the limit of 1090 MW approved by the Commission and so upheld by the APTEL. By relying upon Supreme Court Judgment, SWPGL has stated that capacity once approved and gone through the process of procurement cannot be reduced.
- 14.2 While opposing request of SWPGL, MSEDCL has contended that the intention behind the power procurement of 1090 MW was the prevailing demand-supply as envisaged in FY 2009-10 and APTEL in its judgment acknowledged the same as “*due to some exigencies*”. APTEL in the judgment specially dealt with the process carried out by MSEDCL and not on the quantum of procurement. APTEL Order has been implemented and accordingly MSEDCL has signed PPA with SWPGL for 240 MW dated 2 July, 2020. The disputes of PPA between RPL and MSEDCL are the subsequent events after implementation of the APTEL judgment and are required to be dealt with separately. Therefore, the interpretation of SWPGL that it is entitled to provide balance quantum of power is misinterpretation of APTEL Judgment and MSEDCL reserves its right to issue fresh bids for the balance power, if required.
- 14.3 RPL Nashik objected that SWPGL’s present Petition is contingent or conditional Petition which depends on the supply of power from RPL Nashik to MSEDCL as per APTEL Judgment. The process of executing PPA between RPL and MSEDCL has been started in 2019 after the Orders of the Supreme Court. Further RPL’s Petition for adjudication of the dispute about cancellation of LoI is pending before this Commission and is the subsequent event post implementation of the APTEL Judgment by the Commission. Therefore, the contention of SWPGL that RPL is not able to supply power and thereby its right to supply balance power is premature.
- 14.4 In this regard, the Commission notes that APTEL in its judgment dated 10 February 2015 has allowed/upheld commission’s decision of allowing MSEDCL to enter into PPA for 1090 MW without going into fresh bidding process only because of the prevailing demand supply gap of 1447 MW envisaged for FY 2017-18 which was then projected to reach upto 6434 MW by FY 2019-20. Thus, such power procurement was allowed considering the then prevailing exigencies. While allowing such quantum of

1090 MW, APTEL has set aside commission's decision of allocating such power amongst APML and RPL Nashik, and ruled that every bidder in earlier bidding process needs to be provided with opportunity to offer power within such 1090 MW quantum. As other bidders in earlier bidding process were not interested in offering additional power at discovered tariff, APTEL directed MSEDCL to approach RPL Nashik and SWPGL for supply of power at earlier discovered tariff of Rs. 3.28/kWh. APTEL further directed to allocate such power amongst these three generators based on ratio of power offered by them within cumulative limit of 1090 MW.

- 14.5 Thus, APTEL vide its Judgment dated 10 February 2015 has issued following limited directions to be complied with by MSEDCL and the Commission:

“53. Accordingly, we direct MSEDCL to approach IBRL-Nashik and the Appellant who were the qualified bidders to give their offers for long term supply matching the levellised tariff of Rs. 3.280 per kWh. In case both IBRL-Nashik and the Appellant are able to offer matching the tariff of Rs. 3.280 (levellised), additional procurement of power (1090 MW) shall be approved by the State Commission amongst M/s. APML, IBRL-Nashik and the Appellant on pro-rata basis on the quantum offered by them i.e. in the ratio of 440 MW, 650 MW and the quantum offered by the Appellant on long term basis respectively. If the Appellant is not prepared to offer any power at Rs. 3.280 per kWh and IBRL-Nashik is prepared to offer power at Rs. 3.280 per kWh levellised then the power procurement shall be approved from APML and IBRL-Nashik for 440 MW and 650 MW respectively. If IBRL-Nashik offers less than 650 MW at the tariff of Rs.3.28 per kWh (levellised) then the power will be allocated amongst APML, IBRL-Nashik and the Appellant in the ratio of 440 MW and the quantum in MW offered by IBRL-Nashik and the Appellant respectively and for balance power, if any, fresh procurement process shall be initiated by MSEDCL. In case IBRL-Nashik and the Appellant do not agree to offer power on long term basis at levellised tariff of Rs. 3.280 per kWh, MSEDCL would take action for procurement of balance 650 MW (over and above 440 MW already approved in the impugned order for procurement from M/s. APML at Rs. 3.28 per kWh – levellised) through a fresh competitive bidding process.” [emphasis added]

Thus, APTEL directed MSEDCL to approach RPL Nashik and SWPGL seeking offer for power supply at rate of Rs. 3.28/kWh. Thereafter APTEL directed the Commission to allocate 1090 MW power amongst three generators i.e. APML, RPL Nashik and SWPGL on pro-rata basis on quantum offered by them. In above para, APTEL also laid down various scenarios of offers that can be received from RPL Nashik and SWPGL, and how to allocate power amongst the generators under such scenarios.

- 14.6 Accordingly, during remand proceedings in Case No. 53 of 2012, the Commission noted that RPL Nashik had offered 650 MW and SWPGL had offered 310 MW at the rate of Rs. 3.28/kWh. In this situation, first scenario stipulated by the APTEL becomes

applicable and accordingly, the Commission vide its Order dated 19 January 2019 has allocated 1090 MW amongst three generators as follows:

Seller	Earlier Allocation (MW)	Quantum offer subsequent to ATE Judgment		Revised quantum on pro-rata basis (MW)
		MW	%	
APML	440	440	31	343
RPL	650	650	46	507
SWPGL	-	310	22	240
Total	1090	1400	100	1090

With the above order allocating 1090 MW amongst three generators, the Commission has complied with APTEL judgment dated 10 February 2015.

- 14.7 It is important to note that except APML (whose share has been reduced from 440 MW to 343 MW) no other generators have appealed against such allocation of 1090 MW. Thus, both RPL and SWPGL have accepted above allocation. APTEL vide its Judgment in appeal filed by APML has restored PPA quantum of APML to 440 MW. Based on such allocation MSEDCL has already signed PPAs with APML (440 MW) and with SWPGL (240 MW).
- 14.8 PPA with RPL Nashik (507 MW) is yet to be signed and hence SWPGL is arguing that under this circumstance, the scenario in which RPL Nashik offering less than 650 MW of power as stipulated in APTEL judgment dated 10 February 2015 needs to be operated and accordingly SWPGL needs to be allowed to supply more power to MSEDCL. In the opinion of the Commission such request cannot be allowed as this Commission has already acted upon APTEL judgment and allocated quantum as explained above. Said APTEL judgment had limited scope of allocating power amongst the generators based on their offers at that point of time, which has been complied with by Commission's Order dated 19 January, 2019.
- 14.9 Present request of SWPGL is similar to situation wherein if one of the bidders amongst multiple bidders selected through competitive bidding process for supply of power failed to execute the project then other bidders are eligible to get an increase in their allotted quantum to fill up the gap created due to non-performing bidder. However, none of the competitive bidding guidelines notified by the Government under Section 63 of the EA, 2003 allows such revision in quantum of other bidders due to failure of other bidders. Bidding guidelines prescribe penalty for default which buyer has to invoke and for its unfulfilled power requirement it has to initiate fresh bidding process.
- 14.10 SWPGL has relied upon Supreme Court judgment in *Civil Appeal No. 3481-3482* of 2018 dated 25 April, 2018 wherein it has upheld the APTEL decision that the capacity once approved and having gone through the process of procurement cannot be subsequently reduced. Accordingly, it is contended by SWPGL that MSEDCL cannot be permitted to resile from procuring the capacity of 1090 MW in aggregate from the three generators. In this regard, the Commission notes that facts and circumstances in above referred Supreme Court judgment are completely different from those of the

present case. In that case post competitive bidding process and execution of PPA with successful bidders for the bided capacity, on request of buyer distribution licensee, that State Commission had allowed reduction in quantum of PPA to be signed and therefore APTEL/Supreme Court held that Commission cannot reduced quantum as its role under competitive bidding process is limited to adoption of the tariff which has been discovered through transparent process of bidding. Whereas in the present matter, competitive bidding process was not conducted for 1090 MW and the Commission through its Order dated 19 January 2019 has already allowed allocation of 1090 MW amongst generators. The said decision of the Commission (upheld by APTEL) were case specific based on the then existing exigencies of Demand-Supply gap. The same cannot be generalised in the manner prayed by SWPGL. Also, the Commission u/s 86 (1) (b) of the Electricity Act, 2003 has the responsibility of regulating the power procurement of the Distribution Licensees which necessarily binds it to consider the Demand-Supply scenario and ensure that the avoidable costs are not loaded on the consumers. Thus, Supreme Court judgment relied upon by SWPGL is not applicable in present matter.

14.11 In view of the above, the Commission is of the opinion that SWPGL cannot rely upon APTEL Judgment dated 10 February 2015 for requesting additional quantum of PPA for supplying power to MSEDCL.

14.12 Beside above legal position, SWPGL's present petition is based on premise that RPL Nashik would not be able to supply 507 MW power allocated to it. The Commission notes that MSEDCL is yet to sign PPA with RPL Nashik and in fact MSEDCL has issued LOA cancelation letter to RPL Nashik. However, RPL Nashik has filed petition before this Commission challenging such cancellation of LoI. Under such circumstances, SWPGL's present petition is also premature.

15. Issue B: Whether MSEDCL be directed to sign additional power procurement contract with SWPGL based on bidding process conducted in 2010?

15.1 SWPGL has contended that as RPL Nashik would not be supplying allocated 507 MW power, it should be allowed to supply additional power from its plant. It has also mentioned that MSEDCL on affidavit in Appeal No. 50 of 2019 before the APTEL has stated that it required additional power of 97 MW, which established that it had power requirement beyond 1090 MW.

15.2 While opposing such contention, MSEDCL stated that 1090 MW power requirement was assessed during 2012, but presently it has surplus power contracts. Further, renewable energy is available at much cheaper rate than PPA rate being offered by SWPGL which is always subjected to increase on account of Change in Law. Regarding, additional power requirement of 97 MW agreed before the APTEL, MSEDCL has stated that such statement was based on scenario applicable at that point of time. Its power requirement has substantially changed due to ongoing COVID-19

pandemic. In case, it requires any additional power, it will conduct fresh bidding as per competitive bidding guidelines.

- 15.3 In this regard, the Commission in earlier part of this Order has already recorded that its approval for procurement of 1090 MW without going for fresh competitive bidding was based on the then prevailing demand-supply gap. Same was also recorded by APTEL and allowed as ‘prevailing exigencies’. However, present situation has drastically changed. MSEDCL has already contracted sufficient quantum of conventional power at least for next 4 years and therefore, in MYT Order dated 30 March, 2020, the Commission has projected surplus energy as follows:

Particulars		FY 20-21	FY 21-22	FY 22-23	FY 23-24	FY 24-25
Energy Available	MU	160753	164645	167728	172536	177592
Energy Requirement	MU	139413	141940	144484	148759	153204
Surplus Energy	MU	21340	22705	23244	23777	24388
	%	13%	14%	14%	14%	14%

Thus, MSEDCL has almost 14% of its contracted power as surplus energy. Above surplus does not include energy projections from 507 MW allocated to RPL Nashik or SWPGL’s 240 MW PPA which was signed post issuance of MYT Order. It is also important to note that above projection was done before onset of COVID-19 pandemic. MSEDCL’s energy sales have significantly got impacted due to pandemic and hence such surplus may further increase in future.

- 15.4 Although, surplus contracted capacity assures energy security for consumers, this security comes with the associated cost. In case of thermal generation, Distribution Licensee has to pay fixed charges against availability of station irrespective of actual energy drawal. Thus, surplus contracted thermal capacity increases fixed cost burden in power purchase expenses of MSEDCL which has to be ultimately passed on to consumers. Further to reduce such impact from retail consumers to some extent, the Commission has approved levying of additional surcharge on Open Access consumers to the extent of thermal capacity which gets stranded due to sourcing of their power requirement from other sources through open access arrangement.
- 15.5 The Commission also notes that following provisions of Tariff Policy 2016 and MERC MYT Regulations 2019 mandates power procurement through competitive bidding only:

Tariff Policy 2016:

“5.2 All future requirement of power should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a company owned or controlled by the State Government as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.”

.....
6.1 Procurement of power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time.....” [Emphasis added]

MERC (Multi Year Tariff) Regulations 2019:

“19.3 All future procurement of short-term or medium-term or long-term power, including Renewable Energy, shall invariably be undertaken through competitive bidding in accordance with Guidelines notified by the Government of India under Section 63 of the Act:

Provided that in case either no competitive bids are received or the bids received are higher than the prevailing market rates or on any other sufficient reason, then the Distribution Licensee may procure medium-term or long-term power under Section 62 of the Act, subject to fulfilling the conditions specified in Regulation 21.”

[Emphasis added]

- 15.6 Considering above statutory provision mandating power procurement through competitive bidding, present demand-supply scenario wherein MSEDCL has surplus contracted capacity and the possibility of procuring cheaper RE Power for shortfall (if any) as evidenced from various recent Orders of the Commission adopting solar, wind or hybrid RE tariffs, directing any additional power procurement that too without competitive bidding is not at all warranted.
- 15.7 In case MSEDCL wishes to initiate any additional long term / medium term power procurement over and above the quantum which has been considered in MYT Order 2020, it has to approach the Commission with detailed long term demand supply projections so that quantum, for which procurement process is to be initiated, can be ascertained after due prudence check. Thereafter MSEDCL can call for bids as per competitive bidding guidelines notified by the Government under Section 63 of the EA 2003. During that competitive bidding process, along with other bidders, SWPGL will also get opportunity to participate. Such process would be more transparent and discover market reflective tariff.
16. In view of above analysis, the Commission is not inclined to grant relief as sought by SWPGL in the present matter.
17. Hence, following Order:


ORDER

Case No 228 of 2020 is dismissed.

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

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

**Sd/-
(Sanjay Kumar)
Chairperson**


(Abhijit Deshpande)
Secretary

