

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Interim Application in Case No 65 of 2021

Interim Application filed by RattanIndia power Limited (Amravati) in Case No 65 of 2021 for payment of 50 % of the outstanding amount towards energy supplied to MSEDCL under PPA dated 22.04.2010 and 05.06.2010.

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

RattanIndia power Limited: - Petitioner
Vs
Maharashtra State Electricity Distribution Company Ltd:-Respondent

Appearance

For Petitioner: - Shri Venkatesh (Adv.)
For Respondent: - Shri Ravi Prakash (Adv.)

ORDER

Date: 26 May, 2021

1. RattanIndia power Limited (**RPL**) has filed an interim application dated 11 May, 2021 under Regulation 92, 93 and 94 of MERC conduct of Business Regulations, 2004 read with the provisions of PPA dated 22 April 2010 and 5 June 2010 seeking interim relief in terms of 50 % payments of outstanding and overdue amount from Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**) for the supply of power from October 2020 to May 2021.
2. **RPL's main prayers are as under:**
 - a) *Direct the Respondent to pay 50% of the total outstanding amount payable for the supply of power by the Petitioner;*

b) Direct the Respondent to reduce and refund 50% of the CPG amount in line with the submissions made above;

3. RPL in its interim Application has stated as follows:

- 3.1 RPL has been supplying uninterrupted power to the MSEDCL w.e.f. July 2013 and has been raising timely invoices upon MSEDCL for the power being supplied by RPL. However, in spite of several requests and reminders by RPL, MSEDCL has failed to make timely payments against the invoices raised by RPL.
- 3.2 The total outstanding amount as on 10 May, 2021 has mounted to Rs. 909 Crores. RPL, after recovering from financial stress in the year 2019, has limited working capital and credit dependency. Therefore, beyond a point, it is not possible for such station to keep on generating power without making corresponding payments to coal suppliers and towards railway freight.
- 3.3 Despite all the difficulties, RPL, for the past 4 months, has been persistently requesting MSEDCL to make payments against the overdue amount and the outstanding amount in view of the fact that RPL, under the Fuel Supply Agreement (**FSA**), is obligated to make payment to the coal supplier in advance. In fact, the situation has become so dire that RPL is operating on a thin margin on 10-15 days of coal as the coal stock has depleted. In the absence of immediate disbursal of funds by MSEDCL, RPL may have to back down/shut down its units.
- 3.4 In order to put the situation in perspective the following is relevant:
 - a. All five units of the RPL's Plant has been continuously operating to supply power to MSEDCL. Accordingly, the plant has been consuming around 4.5 rakes of coal, amounting to around Rs. 8 Crores on daily basis;
 - b. In order to procure linkage coal from South Eastern Coalfields Limited (**SECL**) under the FSA, the Company is required to deposit the coal value for the entire month in advance i.e. approx. 200-250 Crores;
 - c. However, for the past 6 months, the payment from MSEDCL is grossly insufficient to keep the coal supplies intact and plant operational. The same is evident from the following substantial outstanding which is yet to paid by MSEDCL:

Billing & Payment in respect of Power supplied by RattanIndia Power Ltd to MSEDCL from Amravati TPP (Amount in Rs Cr)							
Sr	Month	Energy Bill Raised	CIL (As verified by MSEDCL)	Total Undisputed Amount payable by MSEDCL	Amount Paid by MSEDCL	Closing Balance of Outstanding	Closing Balance of Overdue
1	Oct-20	60.20	0	60.20	52.16	174.48	114.28
2	Nov-20	62.21	0	62.21	23.35	184.53	122.32
2	Dec-20	60.20	0	60.20	78.87	221.38	161.18
3	Jan-21	145.75	8.28	154.03	75.03	296.54	142.51
4	Feb-21	246.30	21.74	268.04	150.00	489.55	221.51
5	Mar-21	226.45	19.99	246.44	205.00	585.99	339.55
6	Apr-21	272.15	24.79	296.94	183.00	677.93	380.99
7	May-21	242.75	21.64	264.39	0	759.32	494.93
8	LPS till 28 Apr 2021 (As held by APTTEL)			171.08		930.40	

**CIL compensation of Energy Supplied in April is yet to be verified by MSEDCL*

3.5 Despite the above, MSEDCL has not tried to resolve the issue. In fact, MSEDCL, in its letter dated 24 April, 2021, on a completely erroneous interpretation of the bidding documents and the PPAs, has contended that RPL is liable to continue supplying energy even though MSEDCL is not able to fulfil its obligation. MSEDCL has made a reference to the clause of Late Payment Surcharge (**LPS**) as a defence to not make payments under the PPAs.

3.6 LPS is a deterrent for not fulfilling the contractual obligations and MSEDCL is using it as a tool to derail the payments. Moreover, MSEDCL are not even paying LPS on time on behest of some or other reasons. The obligation of supply of power by RPL is not a stand-alone obligation and is contingent upon the payment of tariff by MSEDCL. This understanding is borne out from a bare perusal of Article 4.4.1 and Article 11 of the PPAs. It is to be noted that these are reciprocal obligations which cannot exist independently. In this regard, reliance is placed on Section 50-55, specifically Section 53 and 54, of the Indian Contract Act, 1872 which provides the law relating to performance of reciprocal promises under a contract.

3.7 In addition to the above, MSEDCL has arbitrarily withheld an amount of Rs. 12.46 Crores [Rs. 7.01 Crores (Principal amount) + Rs. 5.45 Crores (Late payment surcharge)] for the Change in Law claim decided in favour of RPL in Order dated 25 March 2015 in Case No. 173 of 2013.

Reduction in CPG

3.8 MSEDCL has denied reduction of CPG on a completely fallacious interpretation of the PPAs. Article 3.6 of the PPAs does not provide that RPL has to maintain no-default status for the preceding 36 months only during the first 5 years from the Delivery Date.

The said provision provides a minimum 5 years block from the Delivery Date in order to claim reduction in CPG. However, there is no restriction if the same is claimed any time after the said period of 5 years expires.

- 3.9 Therefore, RPL would be entitled to seek reduction of CPG in the present instance as there has been no default preceding 36 months under the 5 years block after the first 5 years' time block from Delivery Date.
- 3.10 Further, Ministry of Finance (MoF) *vide* Office Memorandum (OM) dated 12 November, 2020, has provided relief to parties in government contracts by reducing the value of Performance Security of all existing government contracts from the standard norms of 5-10% to 3% of the value of the contract and also clarifies that the reduced value of the Performance Security (i.e. 3% of the value of the contract) will continue for the balance term of the contract and there shall be no subsequent increase of the Performance Security.
- 3.11 In view of the above OM issued by MoF and the provision of Article 3.6 of the PPAs, it is requested to reduce the total CPG amount of Rs. 360 Crores (i.e. 100 % of the value of the contract) to 50% of the annual contract i.e., Rs. 180 Crores till the time the matter is pending before the Commission.
- 3.12 The prayer for reduction of CPG is imperative in the current state of affair where RPL is struggling to sustain its operations. In the absence of immediate funds, RPL would have to cease its operations which would then compel MSEDCL to procure more expensive power through exchange. The said scenario is not in the interest of all parties concerned. Therefore, it is necessary that interim payment as sought for in the present Application is directed by the Commission.

Precarious financial condition of the Applicant

- 3.13 RPL is a victim of many regulatory and non-regulatory issues which are outside the RPL's control, viz., lack of fuel, non-payment of dues by MSEDCL, imposition of penalty for not maintaining normative plant availability due to shortfall in committed quantity of coal, and not able to do debt servicing on time etc. In addition to the above, the action of MSEDCL in not paying the legitimate dues of RPL has added to the severe financial hardships being faced by the Applicant. In this regard, the following is noteworthy:
- a. Due to the issue of substantial outstanding dues from MSEDCL, coupled with the extraneous stress prevailing in the power sector due to larger sectoral issues, RPL was not able to do debt servicing on time which may result in default of contractual obligations towards the Investors of RPL .
 - b. After the process of One Time Settlement with its earlier lenders, RPL was rescued by the new investors. However, RPL is under an obligation to make timely payment to its new investors.

- c. Due to the Covid-19 pandemic and the resultant restriction, there was a reduction of more than 30% in demand for power, and significant hardships were imposed on the business of RPL.
- d. Due to the aforesaid lockdown, the entire judicial machinery also came to a grinding halt which has delayed the recovery of a large amount of disputed receivables (approximately Rs. 2,600 Crores) towards RPL.
- e. To make the situation worse, MSEDCL stopped making timely payments against the outstanding amount for the supply of power.

3.14 RPL is under an obligation to make timely payments to its investors/lenders. However, in the current scenario RPL is not even in a position to operate the plant in a sustained manner. The same would have precarious impact on the financial health of RPL.

3.15 In view of the above, it is requested to allow interim application for adjudication.

4. MSEDCL in its submission dated 14 May, 2021 has stated as follows:

- 4.1 RPL has not complied with the process provided in clause 14.2 of the PPA relating to amicable settlement and therefore filing of this dispute resolution petition is pre-mature, in terms of the PPA.
- 4.2 Clause 14.3.1 provides for dispute resolution before the appropriate commission if the disputes pertain to Article 4.9.1, 10.3, 15.3, and Clause 12.9.4 of Schedule 12. And all other disputes have to be settled through Arbitration as per Article 14.3.2. Pertinently, in the present Petition, raised disputes fall within the realm of Article 14.3.2 & not 14.3.1. Therefore, the same can only be resolved through Arbitration.
- 4.3 With reference to RPL's relief qua payment of dues, PPA provides for a complete and unambiguous mechanism / consequences in case where there is a delay in payment of dues, in terms of LPS and Third-Party Sale. Hence, the Contract / PPA provides for a detailed procedure, however RPL is seeking specific performance / reliefs that are devoid of these provisions of the PPA, and hence any such relief is not legally tenable.
- 4.4 The country is going through the Covid-19 pandemic and Maharashtra is hit worse than other states. MSEDCL is also severely affected due to lockdown/partial lockdown imposed due to Covid-19 pandemic as follows:
 - a. Due to lockdown conditions, consumers across all categories are not in a position to make payment of their electricity bills on time; and it has impacted the demand from consumers, which has significantly reduced from FY 2019-2020 (75432.1 Cr) to FY 2020-21 (69626.8 Cr),

- b. Further, collection of tariffs has also dropped from FY 2019-2020 (70048.9 Cr) to FY 2020-21 (64653.1 Cr.) considerably. Rather the collection efficiency has dropped from 96.20% in FY 2018-19 to 93.56% in FY 2019-20 and even less than that in FY 2020-21.
- c. It has also drastically impacted subsidies, as the power consumption of the 'subsidising consumer' and the 'subsidised consumer' i.e. consumer mix has totally changed against as approved by Commission. This has impacted the 'cross subsidy structure' given by the Commission in the MYT Order.
- d. There is huge financial impact of the above listed factors, especially on the cash flow of the MSEDCL.
- e. On the other hand, there also has been an all-time low recovery from agriculture consumers, which covers around 30% sale of power by MSEDCL. Similarly, the arrears of government departments for supply of electricity to public water works and street light consumer's category are accumulated.
- f. Further because of present FBSM adopted in State and its issues, MSEDCL is not getting monthly/weekly deviation settlement charges and one of the distributor companies i.e., BEST has not paid Rs.375.25 Crores till date. The Commission had not allowed any recovery of interest on previous settlements.
- g. With the Covid restrictions in force in this current year also, there are limitations on the movements of personnel and MSEDCL is working with only 15 % employee strength. That around 6638 employees of MSEDCL have been / are infected so far with Covid-19 and around 214 of these have been fatal. Considering this life-threatening pandemic, the prevailing lockdown, work from home - the recovery drive has been vastly affected and no disconnection of consumers is possible at this juncture. This situation does hamper the recovery of arrears from the defaulted consumers.

4.5 The impact of a lockdown or a partial lockdown in the State of Maharashtra has vastly impacted authorities, companies, business alike and the DISCOM / MSEDCL is no less different.

4.6 Due to the above stated reasons, MSEDCL has not been a position to release payment to power suppliers (completely or partially) within due dates of the PPA, however, has attempted to ensure commercial viability and ensuring balancing interests of all stakeholders. The payments under the PPAs may have been delayed but over a period of time, even during the pandemic, the payments have been released to most generators for purchase of power.

4.7 In order to mitigate the financial deficit, MSEDCL has taken short/ medium term loan from various banks / financial institutions time to time to the extent of Rs. 27800 Crs. as

on March 21 as against Rs. 21441 Cr as on March 20 and tried to discharge the liability towards power purchase cost. The financial position of MSEDCL is very precarious and total loan & payables as on 31 March 2021 is Rs. 57,757 Crores which includes loans of about Rs 43,000 Crores and & payables of around Rs. 14,757 Crores. The arrears/receivables from consumers including Delay Payment Charge (**DPC**) is around Rs.66,193 Crores. MSEDCL has crossed the normative level of working capital loan to reduce the burden of DPC. Moreover, the interest on working capital is also not allowed as pass through in tariff by the Commission, which in turn aggravates the financial position of MSEDCL.

- 4.8 MSEDCL would like to lay emphasis on the fact that from April 2020 till May 2021 MSEDCL has paid Rs. 1329 Cr to RPL against the total invoices of Rs. 1723.65 Cr i.e 75% of the dues has been cleared by MSEDCL. The details of the payments made is as under:

(Rs in Cr)

Month	450 MW		750 MW		Total	
	Due	Payment	Due	Payment	Due	Payment
Opening Balance	0.86		1.57		2.43	
Apr-20	61.10	44.80	101.23	0.20	162.33	45.00
May-20	39.92		66.53		106.44	
Jun-20	22.56	12.92	37.60	76.00	60.16	88.92
Jul-20	45.87	43.42	76.45	129.36	122.32	172.77
Aug-20		45.87		38.85		84.72
Sep-20	23.31	32.56	38.85	37.60	62.16	70.16
Oct-20	23.31	13.31	38.85	38.85	62.16	52.16
Nov-20	22.58	23.31	37.63		60.20	23.31
Dec-20	22.33	22.58	38.88	56.28	62.21	78.85
Jan-21	22.58	23.33	37.63	51.67	60.20	75.00
Feb-21	57.76	77.23	96.27	72.77	154.04	150.00
Mar-21	100.52		167.53	205.00	268.05	205.00
Apr-21	92.42	170.70	154.03	12.30	246.14	183.00
May-21	111.35	6.59	185.59	93.41	296.94	100.00
Total	646.59	516.60	1077.76	812.29	1723.65	1328.89

- 4.9 Delay in timely payment to the generators is neither deliberate nor intentional and is solely attributable to the financial constraint of MSEDCL due to the circumstances which are beyond the control of MSEDCL and not wilful.

- 4.10 Relief in the instant case must not be at the cost of another pending misery, ready to unleash. MSEDCL has placed reliance of APTEL Judgment in *Damodar Valley Corporation v/s Jharkhand State Electricity Regulatory Commission & Ors., being Appeal No. 170 of 2020, Order dated 28.01.2021,*

- 4.11 MSEDCL is making the payment to power suppliers as per availability of funds on best effort basis. In spite of all the hurdles MSEDCL has always paid the dues of Independent Power Producers (**IPP**) generators from time to time. As on 12 May, 2021, amount due

to RPL is Rs. 411.22 Crores only. Claims of Rs. 930.40 Cr. included in the petition of RPL include Rs. 264 Crores bills for the month of April 21 which is not due for payment yet.

- 4.12 RPL is seeking reliefs devoid of the provisions of the PPA, which categorically provides for relief in the form of (a) Late Payment Surcharge and (b) Sale to Third Parties. The said reliefs have been agreed to by the Parties and have been spelled out specifically in the PPA for events such as one at hand, i.e., partially or wholly delayed payment of invoices. Hence, seeking any other relief i.e., in the form of specific performance of payments etc is completely beyond the terms of the PPA.
- 4.13 The Commission must balance the interests and operations of the Distribution Licensee. The Commission cannot call upon the Distribution Licensee to specifically perform its pending partial obligation under one PPA, at the cost of all other operating and business expenditures that must also be equally allowed to be prioritised by the distribution utility.
- 4.14 On the completion of 5 years from delivery date RIPL have failed to achieve normative availability for both PPA for a period of more than 12 months consecutive or non-consecutive within continuous period of 36 months. From the provisions of PPA, it is clear that, the value of the CPG shall be reduced on successful supply of power as per the terms of PPA for the period of 5 years from the Delivery Date provided that there has been no Seller Event of default in the immediately preceding 36 months.
- 4.15 Since RPL has failed to achieve normative availability during the period of 36 months i.e., immediately preceding 36 months on completion of 5 years from the scheduled delivery date; it has failed to satisfy the condition precedent to reduce the CPG.
- 4.16 It is requested to dismiss the present prayer regarding reduction of CPG and to dismiss the Interim Application filed by RPL.

5. At the time of E- Hearing held on 14 May 2021

5.1 Advocate of RPL:

- a. Advocate of the Petitioner stated he has filed this instant Petition for the payment of the outstanding amount which is in the tune of Rs 930 Cr as on 10 May, .2021. He clarified that he is pressing the issue of overdue bills of the power which is already supplied and consumed by MSEDCL. He is not pressing the other points included in the interim application.
- b. He further stated that RPL has been persistently requesting MSEDCL to make the payments against the overdue amount and the outstanding amount. The company is under financial stress and if such precarious situations continue, beyond a point, it is not possible for such station to keep on generating power without making corresponding payments to coal suppliers and towards railway freight. At least release

of 50% of the outstanding amount will help RPL to clear the bills of coal supplier and the freight charges which might survive the plant for operation.

- c. The Financial condition as depicted by MSEDCL for not making payments is not as bad as per their submission. It is the responsibility of both the generator and the procurer to supply power and to make timely payments as per the various provisions of PPA. It could not be read unilaterally.
- d. He further contended with the details in following table that MSEDCL would be incurring losses by procuring power from power exchange (IEX) instead of procuring it from RPL:

Sr	Particulars	UOM	Formula	Amount
1	RPL's net installed capacity	MW	A	1200.00
2	Monthly Generation at 100% PLF	MU	$B=(A \times 30 \times 24 \times /10^3)$	864.00
3	Quoted Variable Charge	Rs/kWh	C	2.44
4	Change in Law impact	Rs/kWh	D	0.28
5	Total existing Tariff of RPL	Rs/kWh	E= C+D	2.72
6	Avg. RTC price at power exchange during April 2021	Rs/kWh	F	3.70
7	Difference in Tariff between RPL and Exchange	Rs/kWh	$G= F - E$	0.98
8	Est. monthly loss to MSEDCL due to shutdown of RPL	Rs Cr	H=(G X B)/10	84.73

In case, MSEDCL does not pay RPL's dues, RPL would not be able to procure coal for continuing power generation and in that case by procuring alternate power form power exchanges, MSEDCL will be incurring loss of Rs. 0.98/kWh.

- e. He objected to the submission of MSEDCL that it has not followed the procedure laid down under the PPA under Dispute Resolution mechanism and the Commission has no jurisdiction to entertain the same. He stated that he has made MSEDCL aware of its financial conditions and need for release of payments through its various letters. Further as per EA, 2003 under Section 86, the Commission has jurisdiction to adjudicate the present Application. He objected to the statement made by MSEDCL that RPL has been treated equally with the other generators without any submission in this regard.

5.2 Advocate of MSEDCL:

- a. Advocate of MSEDCL stated that RPL has not followed process of amicable settlement provided by clause 14.2 of the PPA, therefore filing of this dispute resolution petition is pre-mature, in terms of the PPA. The present dispute falls under Article 14.3.2 and should be resolved under Dispute resolving mechanism through the appointment of arbitrator by the Commission. Further there are various provisions in PPA such as LPS, third party sale, in case of delay in payment from the procurer.

- b. 75% of the bills of RPL for procurement of Power have been released by MSEDCL in spite of the fact that MSEDCL is also facing financial crises due to COVID 19 situations.
- c. MSEDCL is making its best efforts to clear the outstanding of the generators from time to time as per the availability of the funds along with LPS in case of delay in making due payments.
- d. If the Commission entertained such types of request, then each generator which is not satisfied with the payments will approach the Commission for adjudication and this will hamper the whole purpose of PPA and obligations of procurer and seller there under.

Commission's Analysis and Ruling:

- 6. RPL has filed this interim application seeking direction to MSEDCL for release of 50 % of outstanding amount towards supply of power and for reduction in CPG amount under the PPA dated 22 April 2010 (450 MW) and 5 June 2010 (750MW).
- 7. At the time of hearing dated 14 May, 2021, RPL stated that it is restricting scope of interim relief only for release of outstanding payments against the power supplied and the other issues of reduced CPG can be adjudicated in main matter. Accordingly, the Commission is restricting this Order on the issue of non-payment of dues.
- 8. Considering submissions made in the matter, the Commission frames following issues for its consideration:
 - a. Whether the Commission has jurisdiction to adjudicate in present matter?
 - b. Whether interim relief sought in the matter can be granted?

The Commission is addressing above issues in following paragraphs.

9. Issues A: Whether the Commission has jurisdiction to adjudicate in the present matter?

- 9.1 MSEDCL has objected saying that RPL has not exhausted the process of amicable settlement provided under clause 14.2 of the PPA before filing this application/petition before the Commission for adjudication of dispute. Further, by refereeing to clause 14.3.2 of the PPA, MSEDCL has stated that this dispute needs to be referred to Arbitration. Accordingly, MSEDCL has objected on the issue of jurisdiction of this Commission to adjudicate this matter.
- 9.2 While opposing such contentions, RPL has stated that it has been persistently requesting MSEDCL from January 2021 to release the outstanding payments in order to enable it to clear the payment of the coal suppliers and transportation cost. But MSEDCL has not

replied to such requests and hence there is no scope of amicable settlement. Further it has referred to Supreme Court Judgment in the matter of *Gujarat Urja Vikash Nigam Ltd vs Essar Power Ltd* wherein Apex court has held that post enactment of Electricity Act, only appropriate commission can adjudicate all disputes between generating company and licensee. Accordingly, RPL has stated that this Commission has jurisdiction to adjudicate this matter.

9.3 In this regard, the Commission notes that PPAs signed between the parties have following provisions:

“14.2 Amicable Settlement and Dispute Resolution

14.2.1 Amicable Settlement

14.2.1.1 Either party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (“ Dispute”) by giving a written notice (Dispute Notice) to the other party, which shall contain

- (a) a description of the dispute*
- (b) the grounds for the dispute*
- (c) all written material in support of is claim*

14.2.1.2 The Other Party shall, within thirty (30) days of issue of Dispute Notice issued under Article 14.2.1.1, furnish

- (a) Counter claim and defences if any regarding the Dispute and*
- (b) All written material in support of its defences and counter-claims*

14.2.1.3 Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 14.2.1.1 if the other party does not furnish any counter claim or defence under Article 14.4.2.2 or thirty (30) days from the date of furnishing counter claims or defence by the other Party, both the Parties to the Dispute shall meet to settle the Dispute amicably. If the parties fail to resolve the dispute amicably within thirty (30) days from the later of the dates mentioned in this Article 14.2.1.3, Dispute shall be referred for dispute resolution in accordance with Article 14.3.

14.3 Dispute Resolution

14.3.1 Dispute Resolution by Appropriate Commission

14.3.1.1 Where any dispute (i) arises from a claim made by any party for any change in or determination of the tariff or any matter related to tariff or claims made by any Party which party or wholly relate to any change in the tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.9.1, 10.3, 15.3 and Clause 12.9.4 of Schedule 12 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the

Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

14.3.1.2 The obligations of the Procurer under this agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the procurer.

14.3.2 Dispute Resolution through Arbitration

14.3.2.1 If the Dispute arises out of or in connection with any claims not covered in Article 14.3.1.1, such dispute shall be resolved by arbitration under the Indian Council of Arbitration 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article.”

Thus, as per provisions of the PPA, procedure for amicable settlement is precondition for referring dispute to dispute resolution mechanism. Further, under Dispute Resolution mechanism any dispute related to tariff is to be referred to this Commission and all other disputes can be referred to Arbitration.

9.4 The Commission notes that although RPL has not specifically invoked the provision of amicable settlement under the PPA for requesting release of outstanding payment, it has written several letters to MSEDCL for payment of its due amount. MSEDCL has not disputed such claims of RPL. Under such circumstance, provision of amicable settlement under the PPA would not be of any help for payment of un-disputed amount. Therefore, in the opinion of the Commission, there is no merit in compelling RPL for complying with mere technical requirement for amicable settlement (which is to be completed within 30/60 days), when admittedly RPL has been following up with MSEDCL for payment of undisputed amounts for a long period. Accordingly, the Commission rejects this objection of MSEDCL.

9.5 With regard to MSEDCL’s contention that this dispute needs to be referred to Arbitration under the clause 14.3.2 of the PPA, the Commission notes that the Hon’ble Supreme Court in the matter of *Gujarat Urja Vikash Nigam Ltd vs Essar Power Ltd in Civil Appeal no 1940 of 2008 dated 13 March, 2008* has given clear ruling on the jurisdiction of the regulatory commission in the matter of adjudication of dispute between generator and licensee as follows:

“59. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section

86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.

60. We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996. However, as regards, the procedure to be followed by the State Commission (or the arbitrator nominated by it) and other matters related to arbitration (other than appointment of the arbitrator) the Arbitration and Conciliation Act, 1996 will apply (except if there is a conflicting provision in the Act of 2003). In other words, Section 86(1)(f) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedural and other matters relating to such proceedings will of course be governed by Arbitration and Conciliation Act, 1996, unless there is a conflicting provision in the Act of 2003.” [Emphasis Added]

Thus, any dispute between generating company and licensee has to be adjudicated by the Commission and thereafter if deemed appropriate, the Commission can refer such dispute for arbitration.

9.6 In view of the above settled legal position, the Commission rules that it has jurisdiction to adjudicate in the matter.

10. Issues B: Whether interim relief sought in the matter can be granted?

10.1 RPL has contended that it has been supplying uninterrupted power to the MSEDCL w.e.f. July 2013 and has been raising timely invoices upon MSEDCL. However, despite several requests and reminders by RPL, MSEDCL has failed to make timely payments against the invoices raised by RPL. Total outstanding amount as on 10 May 2021 is Rs. 909 Cr. For the past 6 months, the payment from MSEDCL is grossly insufficient to keep the coal supplies intact and plant operational. Under such scenario RPL is not able to operate the plant in a sustained manner. Hence, RPL has requested to allow interim application for payment of 50% of due amount. It has further stated that in the event of non-functioning of RPL's plant would require MSEDCL to procure alternate power from power exchange which may result in additional expenses upto Rs.0.98/kWh.

10.2 While opposing such prayer for interim relief, MSEDCL has stated that delay in timely payment is not deliberate and is attributable to the financial constraint of MSEDCL due to the circumstances which are beyond its control. It has further stated that from April 2020 till May 2021, MSEDCL has paid Rs. 1329 Cr to RPL against the total invoices of Rs. 1723.65 Cr i.e 75% of the dues has been cleared. MSEDCL has also contended that PPA already provided mechanism for delayed payment i.e. Late Payment Surcharge and Sale to Third Parties. Under such circumstances, RPL cannot seek specific performance of PPA devoid of such explicit provisions stipulated in the PPA. MSEDCL has further stated that the Commission cannot call upon the Distribution Licensee to specifically perform its pending partial obligation under one PPA, at the cost of all other operating and business expenditures that must also be equally prioritised by the distribution utility.

10.3 In this regard, the Commission notes that RPL in its application has provided details of invoice raised and payment made by MSEDCL during the period of October 2020 to May 2021. Whereas, MSEDCL has submitted same details for the period of April 2020 to May 2021 with only difference that MSEDCL has not considered invoice of Rs. 264 Cr which has been raised by RPL for the month of April 2021 and it is still not due for the payment. RPL has not raised any objection to the statement submitted by MSEDCL. As the issue involved is about irregular payments, the Commission is considering details submitted by MSEDCL which is for the longer period of 14 months. Said details is summarised in table below:

Month	Amount Due (Rs. Cr)	Payment Made (Rs. Cr)	% of Payment made	Balance Amount (Rs. Cr.)
Opening Balance	2.43	-	-	2.43
Apr-20	162.33	45	28%	119.76
May-20	106.44	0	0%	226.2
Jun-20	60.16	88.92	148%	197.44
Jul-20	122.32	172.77	141%	146.99
Aug-20	0	84.72	-	62.27
Sep-20	62.16	70.16	113%	54.27
Oct-20	62.16	52.16	84%	64.27
Nov-20	60.2	23.31	39%	101.16
Dec-20	62.21	78.85	127%	84.52
Jan-21	60.2	75	125%	69.72
Feb-21	154.04	150	97%	73.76
Mar-21	268.05	205	76%	136.81
Apr-21	246.14	183	74%	199.95
May-21	296.94	100	34%	396.89
Total	1725.78	1328.89	77%	396.89

From above details, it is observed that MSEDCL has paid 77% of the amount due. Also except for 5 months, payment in 9 months is more than 74% of amount raised during the month. In 5 months, MSEDCL has paid amount more than current month bill (<100%) for clearing accumulated dues to some extent. Further, except in 2 months, MSEDCL has made payment in each month. This demonstrates that MSEDCL has been making payment in almost each month to RPL and total amount paid is 77% of amount due.

10.4 It is also a fact that Covid-19 pandemic has impacted revenue collection of MSEDCL. Under such circumstances, even after payment of almost 77% of the amount due to RPL, it would not be proper for this Commission to direct any further payment of due amount on immediate basis. However, this does not absolve MSEDCL of its obligation to pay due amount to RPL and it would be just and proper if RPL be informed about the payment plan (at least on tentative basis). The Commission acknowledges the difficulties of MSEDCL in the recoveries (and hence in giving the tentative payment plan) since everyone is hit by the ongoing pandemic but a tentative payment plan for liquidation of arrears will help RPL to undertake financial planning at their end. It will not be out of

place to mention that it is a responsibility of MSEDCL also to ensure that the stake holders/partners of MSEDCL (RPL in this case) are able to manage the supply chain and discharge their duties as per the provisions of the PPA. Thus, MSEDCL is required to balance the priorities for efficient working (to avoid costlier power purchase from other sources). The Commission, however, acknowledges that payment and the payment plans are the administrative matters which in the normal course are required to be dealt by MSEDCL management and that the Commission is not expected to micromanage the same. However, MSEDCL should ensure that the generators are equitably paid from its resource pool without any discrimination.

- 10.5 In view of above, the Commission is not inclined to consider and grant interim relief requested by RPL in present matter since the payments within the constraints are being released by MSEDCL.
11. Notwithstanding above, the Commission would like to emphasise that it is responsibility of MSEDCL to arrange for power at the least possible rate. RPL has pointed out scenario wherein power available on power exchanges is costlier than that generated by it. The Commission is not going into the merits of the petitioners on this issue since MSEDCL is obligated to resort to most economical power purchase or face the consequences (subject to due diligence) and also due to the fact that the petitioners have merely mentioned the Average rate of power in the exchange and not that the MSEDCL has procured the same from exchange on RTC basis. MSEDCL is expected to honour all the contracts in true letter and spirit and help the generators to smoothly operate their coal supply chains.
12. Hence, the following Order:

ORDER

- 1. Interim relief sought in Case No 65 of 2021 relating to direction for 50% payment of outstanding due amount is not allowed.**
- 2. MSEDCL shall intimate to RattanIndia Power Ltd a tentative payment plan for undisputed arrears within one month.**
- 3. Other issues will be decided in main matter of Case No. 65 of 2021.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Abhijit Deshpande)
Secretary

