

operations. The lack of fuel / coal subsequently resulted in inability to declare Normative Availability. Therefore, the performance by RPL became an impossible event due to breach of contractual obligations by MSEDCL. RPL's inability to maintain the normative availability is hence a consequential breach, which is a direct consequence of MSEDCL's breach/ failure to honour its own contractual obligations.

- 7.4 Provisions of Contract Act are applicable to the PPAs under the Electricity Act. Section 174 of the Electricity Act provides that the provisions of the Electricity Act will override if other laws are inconsistent with it. In the present case, the provisions of Contract Act are in no way in detriment to the Electricity Act. Accordingly, other laws will also be applicable, as long as the same are not in contradiction of the Electricity Act. Section 174 and 175 of the Electricity Act are to be read harmoniously and in consonance with each other. It is evident from perusal of the provisions of the Contract Act that they are not in derogation to the provisions of the Act RPL has placed reliance of Hon'ble Supreme Court Judgments in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*, (2008) 4 SCC 755 and in *A.P. Power Coordination Committee v. Lanco Kondapalli Power Ltd.*, (2016) 3 SCC 468. Electricity Act does not specifically deal with the issue of reciprocal promise and consequential breach. It therefore becomes a necessity to read the said issues in light of Act, as well as the Contract Act.
- 7.5 MSEDCL did not perform its contemporaneous payment obligations under the PPA and is therefore a defaulting party liable to pay damages under Section 73 of the Contract Act. Further, disallowing consequential relief of direct losses to RPL due to MSEDCL's breach will amount to allowing MSEDCL to take advantage of its own wrong, and the said act will be in contravention of the established principles of equity and natural justice.
- 7.6 LPS for delayed payments is merely a mitigation of time value of money and does not in any way whittle down the contemporaneous obligation as enshrined under Article 4.4.1 of the PPA. It is further submitted that LPS is a post-facto relief and granting the same does not negate the fact that monthly payments are essential for the procurement of coal, and breach directly leads to loss by the Petitioner in the form of availability.
- 7.7 MSEDCL is the sole beneficiary of the Project, and since LPS compensates only the time value of the money and does not account for other direct damages caused by late payments, LPS under PPA can never be adequate. Without prejudice to the above, in any case, whole purpose of LPS to keeping the PPA so as to ensure a timely payment and LPS has to be considered as a deterrent value not otherwise as right given to MSEDCL for making and justifying the delayed payment. The payment of LPS is not same as interest to the loan advanced but is penalty suffered on account of default.
- 7.8 Issue of Limitation does not arise as the present Petition has been filed in terms of liberty granted by the Commission in its Order dated 27 February, 2018 passed in Case No. 138 of 2015. MSEDCL has failed to provide any computation basis which such deductions have been carried out by it. Article 8.3.3 of the PPA provides a due process to be followed in case the Procurer wishes to set off /deduct a disputed amount. The Procurer has the

right to set-off a disputed invoice, but only according to the procedure laid by the PPA. MSEDCL has failed to follow the prescribed procedure under Article 8.3.3 of the PPA, and hence has no right to retain any such amount with respect to alleged over-injection.

7.9 MSEDCL's deduction of Rs. 27.43 crores, on account of alleged over-injection is in complete contravention of the Section 171 of the Contract Act, which provides that unless specifically provided under the contract, no person other than defined, has the right of retention.

7.10 RPL is entitled to LPS on both the above-mentioned claims as per terms of PPA.

8. At the time of E- hearing held on 26 April, 2022

8.1 Advocate of RPL reiterated the submission made in Petition. He stated that RPL has approached the Commission in accordance with the liberty granted by the Commission in its Order in Case No 138 of 2015. RPL is agitating the issues of deemed capacity charges, imposition of contract year penalty and for refund of over injection charges. The Petition is filed within limitation period as per Hon'ble Supreme Court Judgment.

8.2 Advocate of MSEDCL stated that RPL is seeking deemed capacity charges from year FY 2013-14 which are time barred as per Limitation Act. PPA provides stipulations binding on both the parties. If the payments were not received by RPL, it could have invoked LC as per PPA. In case No 146 of 2018, the Commission has ruled that it is the responsibility of the generator for arrangement of fuel.

8.3 Post hearing parties, the Commission reserved this matter for Orders.

9. Vide its affidavit dated 19 May 2022, RPL requested to bring on record recent developments. RPL was allowed to mention it during the hearing held on 20 May, 2022. In its application, RPL stated as follows:

9.1 Vide Notification dated 18 May, 2022, MoP issued a direction to all the generating companies including RPL to place orders for import of coal for blending purposes by 31 May, 2022 and if the Order is not placed by 31 May, 2022 and if the imported coal for blending purpose does not start arriving at the power plants by 15 June, 2022, then, all the defaulter generating companies would have to import coal for blending purpose to the extent of 15% (in order to meet the shortfall of imported coal for blending purpose) in the remaining period up to 31 October, 2022. Further, MoP vide the said Notification has decided that domestic coal will be allocated proportionately to all generating companies including RPL based on likely availability of coal from 01 June, 2022 and if the blending with domestic coal is not started by 15 June, 2022 then the domestic allocation of the concerned defaulter thermal power plants will be further reduced by 5%.

9.2 Based on the directions issued by MoP, on 19 May, 2022, RPL issued a letter to MSEDCL to comply with the Order dated 14 February, 2022 passed by the Hon'ble Supreme Court

in Civil Appeal No. 1805 of 2021 and remit the legitimate entitlement of Rs. 380 Crore. Due to inaction on the part of MSEDCL to comply with the Order dated 14 February, 2022, RPL has shut down 2 out of 5 units, despite being technically available to generate, purely due to shortage of coal on account of inadequate funds. Further, RPL vide the said letter, intimated to MSEDCL that failure in giving concurrence for procurement of imported coal and necessary advance payment/financial assistance for placing order of the quantity as directed by MoP vide Notification dated 18 May, 2022, will make the Petitioner entitled to claim the deemed availability from MSEDCL for the Units which are under shutdown due to coal shortage. In such event, MSEDCL will be liable to compensate RPL for the loss of capacity charges for the said period along with interest.

9.3 Accordingly, RPL prayed as follows:

- a. *Direct MSEDCL to make balance payment of the outstanding claim amounting to Rs. 380 Crore as per Hon'ble Supreme Court Order dated 14.02.2022;*
- b. *Direct MSEDCL to make necessary advance payment/ financial assistance in the form of working capital for procurement of imported coal as directed by Central Electricity Authority Notification dated 12.10.2021 (related to maintenance of coal stock level) and MoP Advisories/Directives dated 28.04.2022 and 18.05.2022 respectively; and direct MSEDCL to provide its concurrence for the passthrough of the cost of the imported coal to be procured.*

Commission's Analysis and Ruling:

10. RPL has approached the Commission through the present Petition seeking payment of Rs 613.16 Cr as under recovery of capacity charges and penalty thereof from FY 2013-14 to FY 2018-19 for not maintaining the normative availability due to failure of MSEDCL in making timely payment and to refund the amount of Rs 27.43 Cr deducted by MSEDCL for over injection of Power.
11. While opposing claims of RPL, MSEDCL mainly objected that claims made in present petition are barred by limitation and hence not maintainable. MSEDCL further contended that as procurement of fuel is prime responsibility of RPL, MSEDCL cannot be held responsible for any consequential damages due to non-availability of fuel thereby resulting in lower availability of plant. The consideration of the prayers of RPL will amount to re-writing the contract. Hence, under recovery of capacity charge and penalty thereof for lower availability imposed as per provisions of PPA need not be refunded. It further contended that deduction on account of over injection of power is correct as per prevailing scheduling and deviation regime.
12. Based on the contentions, pleadings and the documents made available on records, the Commission frames following issues for its consideration in present matter:
 - a. Whether claims made by RPL are barred by law of limitation?

- b. Whether RPL is eligible for the deemed capacity charges from FY 2013-14 to FY 2018-19 due to delay in payment from MSEDCL? Whether penalty for lower availability is to be refunded?
- c. Whether RPL is eligible for refund the amount of 27.43 Cr for over injection of Power?
- d. Whether RPL is entitled to Late Payment Surcharge on claim sought in present Petition?

The Commission is dealing with the above issues in subsequent paragraphs.

13. Issue a: Whether claims made by RPL are barred by law of limitation?

- 13.1. MSEDCL has objected that such claims starting from FY 2013-14 are barred by law of limitation, whereas RPL has contended that it had approached the Commission within the time limit in Case No. 138 of 2015 wherein the Commission vide Order dated 27 February, 2018 has granted liberty to RPL for filing separate petition on this aspects. Accordingly, RPL has filed this Petition and hence it is not time barred.
- 13.2. In this regard, the Commission notes that RPL had approached the Commission earlier in Case No 138 of 2015 regarding outstanding payments for supply of power under PPAs and no-provision of Letter of Credit by MSEDCL. The Commission while disposing of the Petition vide Order dated 27 February, 2018 found that the issues of imposition of contract year penalty; deemed capacity charges and payment towards over injection has not been substantiated with the details and the differences that arose during reconciliation of the change in law claims. Therefore, the Commission directed RPL to file separate Petition for these issues. Relevant extract of the Order is as follows:

“19.2. It was only during the course of these proceedings that an exercise was undertaken by RPL and MSEDCL, as directed by the Commission, to jointly reconcile the Bills and receipts. It was only following this process that the component-wise Bill payments claimed as due from MSEDCL under different Heads were expressly identified and stated to the Commission. Once this break-up of the outstandings and the Head-wise disputed amounts became available, the Commission found that, in respect of certain disputed amounts, RPL had separately filed Petitions in respect of some of these such as claims concerning Change in Law events arising from new or increased taxes and other levies, Change in Law impacting Auxiliary Consumption, withholding of amounts towards FAC and Change in Law impact of the CCEA decision of 2013. On the issues of imposition of Contract Year Penalty, deduction of Capacity Charges for deemed generation and non-payment for over-injection of power, the Petition did not substantively address the issues involved nor did it provide

the required details in terms of the relevant PPA provisions, including computations and their methodology and supporting material.

19.3. Thus, in the Petition, the following were subsumed in the outstanding dues shown and were only subsequently disaggregated under separate Heads in the process of joint reconciliation directed by the Commission:

(i) Imposition of Contract Year Penalty;

(ii) Deduction of Capacity Charges for deemed generation; and

(iii) Non-payment for over-injection of power.

These issues were not separately raised in the original Petition, and the nature of each of these claims and disputes are different. As such, they require substantive adjudication considering their circumstances and the terms of the PPAs, and cannot be considered in an ad hoc manner. As such, RPL may approach the Commission on its claims with regard to these issues through a separate Petition.”

In view of the above, it is clear that the directions of the Commission were due to the reasons fully attributable to RPL not filing the petition in proper manner. This being the factual case, the Commission notes that the above said issues were raised in the Petition filed in the year 2015, which was within the time limits under limitation act. Vide above Order dated 27 February 2018, the Commission granted liberty to RPL to file separate Petition on these issues.

- 13.3. The Commission notes that in above Order, the Commission has not specified any timeline for RPL to file separate Petition. After above Order dated 27 February, 2018, RPL has filed present Petition on 27 October, 2021 i.e. after the period of 3 years and 8 months. RPL has justified such delay on account of Covid-19 and cited judgment of Hon’ble Supreme Court relaxing limitation period during Covid-19 pandemic.
- 13.4. The Commission notes that the Hon’ble Supreme Court Order dated 10 January, 2022 has ruled that period from 15 March, 2020 to 28 February, 2022 shall be excluded from the Law of Limitation. Relevant extract of the Order is as follows:

*“5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions: I. **The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings”.***

[Emphasis supplied]

In view of above judgment of the Hon'ble Supreme Court, the Commission notes that present Petition filed by RPL needs to be treated as filed within the time limits.

13.5. In view of the above quoted earlier Order dated 27 February, 2018 of this Commission which granted liberty to file separate Petition to RPL and judgment of Hon'ble Supreme Court excluding period of 15 March, 2020 to 28 February, 2022 from limitation on account of Covid-19 pandemic, the Commission rejects MSEDCL's objection that claims made in present Petition are barred by law of limitation.

14. Issue b:- Whether RPL is eligible for the deemed capacity charges from FY 2013-14 to FY 2018-19 due to delay in payment from MSEDCL? Whether penalty for lower availability is to be refunded?

14.1. RPL has stated that it has not been able to achieve the Normative Availability from 2013-14 to FY 2018-19 except in FY 2016-17 and FY 2019-20 due to the default induced by MSEDCL by not making the adequate payment towards the invoices raised by RPL for supply of power. On account of the said breach, RPL could not procure adequate coal which has ultimately led to loss of Capacity Charges which otherwise could have been recovered. Further it has stated that despite the categorical mandate under Article 8.4.2 of the PPAs, MSEDCL had furnished LC in 2018 only after a specific direction by the Commission in Case No 138 of 2015. The rights and obligations of RPL and MSEDCL arising out of the PPA qua each other are mutual. The PPAs are 'reciprocal' in nature and the parties in a reciprocal contract are dependent upon each other and one party cannot insist on the performance of a contract, wherein it has failed to perform its part of the obligations arising out of the said contract. In view of that RPL requested Rs 613.16 Cr from FY 2013-14 to FY 2018-19 for under recovery of capacity charges and penalty thereof for not maintaining the normative availability as per PPA due to failure of MSEDCL in timely payment.

14.2. While opposing above contentions, MSEDCL has stated that it is the sole responsibility of the generator to procure coal from alternate sources including imported coal to maintain the normative availability as per PPA. Further there are various provisions set out under the PPAs, such as Article 4.1.1, Article 8.1.1, and Article 8.3 etc entitling RPL to consequential compensation, if MSEDCL made breach in any payment terms under the Subject PPAs. MSEDCL has made genuine efforts to make the payments to RPL and 90% of the payment in the disputed period was released including LPS. In spite of having alleged outstanding dues of 30%, RPL managed availability of 99.95% for FY 2020-21. RPL without taking the responsibility for maintaining the coal stocks required for normative availability, is trying to take undue advantage by seeking deemed declaration of capacity.

14.3. The Commission notes that RPL in its submission has agreed that procurement of coal is its responsibility but contended that the said responsibility cannot be discharged if MSEDCL does not comply with its obligation to make payment for power supplied.

Considering these contentions, it would be appropriate to refer to various articles/provisions in PPA relating to payment for power supply:

Article 8 Billing and Payment

8.1 General

8.1.1 From the Commencement of supply of power, Procurer shall pay the Seller the Monthly Tariff Payment, on or before Due Date, comprising of Tariff for every Contract Year, determined in accordance with this Article 8 and Schedule 4. All the Tariff Payments by the Procurer shall be in Indian Rupees

8.3 Payments of Monthly Bills

8.3.1 The Procurer shall pay the amount payable under the Monthly Bill on the Due Date to such Account of the Seller, as shall have been previously notified by the Seller in accordance with Article 8.3.4 below.

8.3.3 All payments required to be made under this agreement shall only include any deduction or set off for

- i) Deductions required by the law; and*
- ii) amounts claimed by the procurer from the seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller and not disputed by the Seller within thirty (30) days from the receipt of the said invoice and such deduction or set off shall be made to the extent of the amounts not disputed. It is clarified that the procurer shall be entitled to claim any set off or deduction under this Article after expiry of thirty (30) Days period*

Provided further the maximum amounts that can be deducted or set off by the Procurer under this Article in a Contract year shall not exceed Rupees Eleven crores Twenty-Five Lakhs [amount calculated as Rs 2.5 lakhs per MW of Contracted capacity] only except sub-Article(i) above

8.3.5 In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded by monthly rest), for each of the delay. The Late Payment Surcharge shall be claimed by Seller through Supplementary Bill.

8.4 Payment Mechanism

Letter of Credit:

8.4.1 The Procurer shall provide to the Seller, in respect of payments of its Monthly Bills and/ or Supplementary Bills, a monthly unconditional, revolving and

irrevocable letter of Credit (“Letter of Credit”), opened and maintained by the Procurer, which may be drawn upon by the Seller in accordance with this Article.

8.4.5 If the procurer fails to pay a Monthly Bill or Supplementary Bill or part thereof within and including the Due Date, then, subject to Article 8.6.7, the seller may draw upon the Letter of Credit , and accordingly the bank shall pay without any reference or instructions from the procurer, an amount equal to such Monthly Bill or Supplementary Bill or part thereof plus Late Payment Surcharge, if applicable , in accordance with Article 8.3.5 above by presenting to the scheduled bank issuing the Letter of Credit , the following documents

- (i) A copy of the Monthly Bill or Supplementary Bill which has remained unpaid by the procurer*
- (ii) A certificate from the seller to the effect that the bill at item(i)above or specified part thereof, is in accordance with the agreement and has remained unpaid beyond the Due Date; and*
- (iii) calculations of applicable Late Payment Surcharge, if any*

.....

8.5.5 Third Party Sell

8.5.1 Upon occurrence of the event where the procurer has not made payment by the due date of an invoice through the payment mechanism provided in Article 8.4 of this agreement the seller shall follow the steps as enumerated in Article 8.5.2 to 8.5.5

8.5.2 On the occurrence of the event as mentioned in article 8.5.1 and after giving notice of at least 7 days to the defaulting procurer , the seller shall have the right to offer 25% of the contracted capacity pertaining to defaulting procurer for sale to third party

8.5.3 deleted

8.5.4 deleted

.....

Article 11: Events of Default and Termination

11.2 Procurer Event of Default

11.2.1 The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Seller of its obligations under this Agreement or a Seller Event of Default, shall Constitute the Event of Default on the part of defaulting Procurer:

- (i) *Procurer fails to meet any of its obligations, as specified in Article 4.3; or*
- (ii) *A Procurer fails to pay (with respect to a Monthly Bill or a supplementary Bill) an amount exceeding fifteen (15%) of the undisputed part of the most recent Monthly/ Supplementary Bill for a period of ninety (90) days after the Due Date and the Seller is unable to recover the amount outstanding to the Seller through the Collateral Arrangement and letter of Credit; or*
- (iii) *the Procurer repudiates this Agreement and does not rectify such breach even within a period of thirty (30) days from a notice from the Seller in this regard; or*
- (iv) *except where due to any Seller's failure to comply with its obligations, the Procurer is in material breach of any of its obligations pursuant to this Agreement or of any of the other RFP Documents where the Procurer and the Seller are Parties, and such material breach is not rectified by the Procurer within thirty (30) days of receipt of notice in this regard from the Seller to the Procurer; or any representation and warranties made by the Procurer In Schedule 7 of this Agreement. being found to be untrue or inaccurate. Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Seller shall give a notice to the Procurer in writing of at least thirty (30) days; or.....*

11.4 Termination for Procurer Event of Default

11.4.1 Upon the occurrence and continuation of any Procurer Event of Default pursuant to Article 11.2.1(ii) , the Seller shall follow the remedies provided under Article 8.5.2 or Article 8.5.5, as the case may be.....”

Thus, PPA mandates payment of monthly bill by MSEDCL within due date. In case of delay, LPS becomes applicable. Further, as payment security mechanism, MSEDCL has to open and maintain Letter of Credit from which RPL can draw the amount in case MSEDCL fails to pay monthly/supplementary bills. Article 8.5.5 has further provided that in case MSEDCL failed to make payment within due date, then RPL can sell 25% of contracted capacity to third party. In case MSEDCL fails to pay at least 15% of undisputed amount of monthly/supplementary bill for 90 days from due date, then it is considered as Procurer Event of default under the PPA.

- 14.4. The Commission notes that RPL has contended that MSEDCL has failed to make regular payment of monthly bill, but at the same time the Commission observes that RPL has not resorted to remedy provided under the PPA i.e. encashing of LC or selling 25% contracted capacity to third party. The Commission notes that LC was opened only in January 2018 and hence option of invoking LC was not available for period prior to that. But once LC has been opened, RPL cannot take shelter behind MSEDCL’s non-payment of its bills without exhausting the specific remedies

provided in the PPA. Further, prior to opening of LC, option of selling 25% of contracted capacity was also available with RPL. But RPL has chosen not to exercise the available option to partially address its problems arising out of late payment by MSEDCL. This shows that RPL is aggrieved by non-payment of bills by MSEDCL, but has failed to invoke provisions which has been incorporated in the PPA for providing payment security.

- 14.5. The Commission notes that RPL has contended that MSEDCL has failed to make payment against undisputed bills whereas MSEDCL has contended that most of such bills have been paid. As there is difference between the figures submitted by both parties, the Commission has used figures of RPL (which is aggrieved party) for following analysis:

FY	Undisputed Amount payable by MSEDCL (Rs. Cr.)	Amount Paid by MSEDCL (Rs. Cr.)	% payment
FY 13-14	294	185	63%
FY 14-15	622	509	82%
FY 15-16	2237	1828	82%
FY 16-17	1660	2083	125%
FY 17-18	1987	1734	87%
FY 18-19	2051	2416	118%
FY 19-20	2030	1963	97%
FY 20-21	1267	1046	83%

As seen from above, minimum 63% payment is made in FY 2013-14 and in all the other years payment was more than 80%. In two years, it is more than 100% which indicates payment towards arrears. This does not show any major payment default by MSEDCL. However, RPL has contended that although there is no major payment default on annual basis, on month-to-month basis, MSEDCL has defaulted substantially which has affected its ability to pay advance to Coal companies for procurement of coal. RPL has provided example of FY 2015-16 and FY 2017-18 which is analyzed below:

Sr	Month	Undisputed Amount payable by MSEDCL (Rs. Cr)	Amount Paid by MSEDCL (Including LPS) (Rs. Cr.)	% Payment
1	Apr-15	35	49	140%
2	May-15	72	55	76%
3	Jun-15	102	85	83%
4	Jul-15	76	79	104%
5	Aug-15	165	157	95%
6	Sep-15	202	88	44%
7	Oct-15	237	143	60%
8	Nov-15	254	120	47%
9	Dec-15	261	275	105%
10	Jan-16	295	325	110%
11	Feb-16	293	220	75%
12	Mar-16	244	235	96%

Sr	Month	Total Undisputed Amount payable by MSEDCL (Rs. Cr.)	Amount Paid by MSEDCL (Including LPS) (Rs. Cr.)	% Payment
1	Apr-17	120	50	42%
2	May-17	184	100	54%
3	Jun-17	183	165	90%
4	Jul-17	117	228	195%
5	Aug-17	109	86	79%
6	Sep-17	171	95	56%
7	Oct-17	229	160	70%
8	Nov-17	114	260	228%
9	Dec-17	169	110	65%
10	Jan-18	91	137	151%
11	Feb-18	237	70	30%
12	Mar-18	263	170	65%

As can be seen from the above tables, minimum payment is 30% in the month of Feb 2018 and out of 24 months and in all the other months, MSEDCL has paid more than 50% of undisputed amount. Also, there are months in which payment is more than 100% which indicates that arrears are also being paid. Hence, in the opinion of the Commission, above monthly details do not support RPL's contention that MSEDCL has substantially failed to make regular payment.

- 14.6. The Commission further notes that PPA recognizes procurer's event of default only when procurer fails to pay at least 15% of undisputed amount for 90 days from bill due date. In the present case, minimum amount paid by MSEDCL is 30% and most of the cases it is above 50%. Hence, there is no MSEDCL's event of default under the PPA.
- 14.7. In view of above analysis, the Commission notes that although MSEDCL was not making full payment of undisputed amount, which they should have adhered to, but it has been paying 50% or more amount at most of the time on monthly basis. Hence, there is partial payment on regular monthly basis. There is no month wherein no payment has been made. In fact there are months when MSEDCL has cleared arrears and hence outstanding amount has been reduced.
- 14.8. Further as highlighted above, PPA has recognized procurer's event of default only if procurer fails to pay at least 15% of undisputed amount. Hence, RPL needs to itself manage its operation till that situation arises. Further, PPA provides mechanism of LC and third-party sale in case of payment default which has not been invoked by RPL. Therefore, in the opinion of the Commission, RPL has failed to avail remedy provided in the PPA for non-payment of dues and through present petition trying to come out of its obligation by citing same incidences of non-payment. Clearly, this cannot be allowed. MSEDCL cannot be held responsible for lower availability of RPL's generating stations. Beside that RPL in present petition has also not provided details of period for which its plant was not available on account of technical reasons other than coal shortage.

- 14.9. The Commission also notes that RPL has relied upon APTEL Judgment in *Raghu Rama Renewable Energy Ltd. v. Tamil Nadu Generation and Distribution Corporation Limited* (Appeal No. 181 of 2013) wherein APTEL has rejected Discom's action of imposing short supply compensation on generator as Discom failed to make regular payment to generator. In this regard, the Commission notes that facts of that case are different from present case. In that case, Discom did not pay any amount to generators for 4 months and subsequent payments is also made after delay of 4 to 9 months. Whereas in present case, at least 50% of undisputed amount is paid in most of the months. Hence, said judgment is not applicable in present matter.
- 14.10. In view of foregoing, the Commission rejects the claim of RPL for deemed capacity charges from FY 2013-14 to FY 2018-19 and refund of contract penalty imposed during that period.
15. **Issue c:- Whether RPL is eligible for refund of the amount of 27.43 Cr for over injection of Power?**

- 15.1. RPL has stated that MSEDCL deducted Rs. 27.43 Cr. for the period FY 2013-14 to July 2016 from its invoices as excess Capacity Charge on account of an alleged over injection of power than the scheduled quantum. RPL issued various letters to MSEDCL on 22 December 2016, 12 May 2017 and 04 July 2017 objecting to such deduction. Through present Petition, RPL requested the Commission to direct MSEDCL for refund of said amount Rs. 27.43 Crores.
- 15.2. While opposing above contentions, MSEDCL stated that if the generator injects power less than the schedule as provided by the MSLDC, then the availability considered for making payment of capacity charges is as follows:

Backing down Quantum (including Zero schedule) + Injected Quantum

As the injected quantum is less than the schedule quantum, actual availability is less than the Declared Capacity. Accordingly, the actual availability is considered for payment by MSEDCL, and not the declared capacity. On the other hand, if power injection by Generator is more than the schedule as provided by the SLDC, the availability considered for making payment of capacity charges is again calculated on the basis of the aforesaid formula. As injected quantum by Generator is more than the schedule quantum, applying the above formula has resulted in payment of capacity charges towards capacity more than what the generator has declared, which is not in accordance with their relevant and applicable PPAs.

- 15.3. In this regard, the Commission notes that by adopting approach stated in above para, MSEDCL is restricting payment of capacity charge to the Declared Capacity/Availability of the Generator. As summation of backdown capacity and actual injected capacity is going beyond declared capacity/availability of the

generating plant, MSEDCL has resorted to reduction of over injected units and restricted payment of capacity charges to declared capacity/availability of generating units. The Commission does not find anything wrong in this approach as generator is getting full capacity charge towards capacity declared by it as per provisions of the PPA. Hence, the Commission rejects RPL claim for refund of over injected units on this account.

16. Issue d : - Whether RPL is entitled to Late Payment Surcharge on claim sought in present Petition?

16.1. RPL has requested to grant Late Payment Surcharge in terms of Article 8.3.5 of the PPA on the amount claimed in this Petition.

16.2. However, as no claim has been approved in this Order, issue of allowing late payment surcharge does not arise.

17. Hence, the following Order.


ORDER

Case No 146 of 2021 is dismissed.

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

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

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


**(Abhijit Deshpande)
Secretary**

