

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13<sup>th</sup> Floor, Cuffe Parade, Mumbai 400005.**  
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**Case No. 1 of 2022**

**Case of KRC Discoms seeking approval for additional power purchase cost incurred in the month of October 2021 on account of uncontrollable factors**

**Petitioners**

- |  |   |                   |
|--|---|-------------------|
| 1. M/s Mindspace Business Parks Private Limited        | } | ..... Petitioners |
| 2. M/s Gigaplex Estate Private Limited                 |   |                   |
| 3. M/s KRC Infrastructure and Projects Private Limited |   |                   |

- |  |                           |
|--|---------------------------|
| 1. Kreate Energy India Pvt Ltd.: -           | Impleaded Respondent No.1 |
| 2. Maharashtra State Load Despatch Centre: - | Impleaded Respondent No.2 |
| 3. Lloyds Metals and Energy Limited: -       | Impleaded Respondent No.3 |

**Appearance**

- |                         |                              |
|-------------------------|------------------------------|
| For Petitioner: -       | Smt. Deepa Chavan (Adv.)     |
| For Respondent No.1: -  | Shri. Adarsh Tripathi (Adv.) |
| For Respondent No.2: -  | Shri. S.V.Jaltare (Rep)      |
| For Petitioner No. 3: - | Smt. Abhishek Khare (Adv.)   |

**Coram**

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

**ORDER**

**Date: 8 November, 2022**

1. M/s Mindspace Business Parks Private Limited (**MBPPL**); M/s Gigaplex Estate Private Limited (**GEPL**); M/s KRC Infrastructure and Projects Private Limited (**KRCI PPL**) in short [ **KRC DISCOMs/ Petitioners**] have filed the Petition on 16 December, 2021 under Section 86 (1) (f) of the Electricity Act, 2003 (**EA, 2003**) seeking approval for

additional power purchase cost incurred in the month of October, 2021 on account of uncontrollable factors.

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

- a. *Approve the additional cost of power purchase incurred over the period from 11th October, 2021 to 31st October, 2021 for reasons beyond their control;*
- b. *Approve the adjustment of the additional power purchase cost with the balances against the respective FAC Fund and levy of FAC for the balance amount, up to the limit of 20% of Variable Charges, in accordance with the MERC MYT Regulations, 2019 and the directions issued by the Hon'ble Commission from time to time regarding FAC Fund;*

**3. Petitioner in its Petition has stated as follows: -**

- 3.1 The Commission has issued the MYT Orders for the fourth control period for the respective Petitioners on 30 March, 2020. In the MYT Orders, the Commission approved the average power purchase rate of Rs. 4.17/kWh, Rs. 4.19/kWh and Rs. 4.10/kWh for MBPPL, GEPL and KRCIPPL, respectively for FY 2021-22 based on the extant Power Purchase Agreements (**PPAs**) of the respective Distribution Licensee.
- 3.2 The Commission, in its Order in Case No. 231 of 2020 dated 31 January, 2021 approved the combined power procurement of 12.5 MW for FY 2021-22 from July 2021 to March 2022, comprising 6 MW for MBPPL, 4 MW for GEPL, and 2.5 MW for KRC Infra on short-term basis.
- 3.3 Accordingly, Petitioners undertook the combined power procurement process through competitive bidding in accordance with the Guidelines notified by the Ministry of Power (**MoP**), Government of India (**GoI**), to procure power on short term basis upto 14 MW (MBPPL: - 6.5 MW, GEPL: - 4.5 MW, and KRCIPPL: - 3 MW).
- 3.4 The Commission vide its Order dated 30 June, 2021 in Case No. 69 of 2021 has adopted the rate of Rs. 3.18/kWh for procurement of power on short term basis up to 14 MW (MBPPL: - 6.5 MW, GEPL: - 4.5 MW, and KRCIPPL: - 3 MW) for the period from 1 July, 2021 to 30 June, 2022 and approved Power Purchase Agreement (PPA) between Petitioners and Kreate Energy India Pvt Ltd. (**KEIPL**).
- 3.5 Petitioners had been purchasing the power from KEIPL in accordance with the terms of the PPA with effect from 1 July, 2021. The Generator, as per the Bid documents submitted by KEIPL during the tender process, was Power Department, Government of Sikkim. However, from day one of the PPA, i.e., 1 July 2021, KEIPL supplied power from the alternative Generator, i.e., Lloyds Metals and Energy Limited (**LMEL**), as per terms and conditions of the PPA and as per the actual Power

requirement intimated by Petitioners on month-to-month basis. Power requirement of Petitioners is being scheduled through advance/FCFS transmission corridor reservation.

- 3.6 For the month of October 2021, Petitioners individually communicated their power requirement to KEIPL in the month of September 2021. KEIPL conveyed its inability to source entire power requirement through Power Department, Govt. of Sikkim (Identified source as per PPA) and conveyed that KEIPL would be sourcing power requirement of Petitioners partially through LMEL and remaining quantum would be scheduled through another generator. However, partial power requirement met through LMEL was only scheduled for the month of October 2021. Petitioners continued to procure the power for the partial requirement through exchange-based contracts.
- 3.7 For the month of October 2021, the power quantum offered by KEIPL was lesser than the contracted capacity mentioned in the PPA, as KEIPL informed that the alternative Generator, viz., LMEL, was unable to meet the entire power requirement of Petitioners. However, KEIPL committed that it would arrange the balance quantum before commencement of actual power supply, i.e., before 1 October, 2021. However, KEIPL could not fulfil the entire power requirement of Petitioners for the month of October 2021.
- 3.8 MSLDC approved the requested Schedule from KEIPL (Generator -LMEL) for the month of October 2021 on 1 October, 2021 for MBPPL and on 30 September, 2021 for GEPL and KRCIPPL.
- 3.9 On 8 October, 2021, KEIPL intimated to Petitioners that, the Generator, viz., LMEL, was unable to run its plant from 11 October, 2021 to 31 October, 2021, on account of the constraints in coal availability in the market and submitted the application for revision in approved schedule for the month of October 2021 for the period from 11 October, 2021 to 31 October, 2021 to MSLDC through online portal. The system generated mail received from MSLDC requesting Petitioners to communicate their consent for the revised despatch Schedule sent by KEIPL.
- 3.10 In view of the intimation from KEIPL regarding non-availability of the generator and subsequent submission of application for revision in schedule on the MSLDC portal, from 11 October, 2021 to 31 October, 2021, to avoid duplication of schedule and to ensure uninterrupted power supply to its consumers in its notified licensee area, Petitioners provided their consent on 10 October, 2021 through online portal to the revised despatch Schedule for the period from 11 October, 2021 to 31 October, 2021 to MSLDC. While providing consent to the revised Schedule, Petitioners informed KEIPL that the Seller shall not sell such power to any third party as per terms and conditions of the PPA. On 11 October, 2021, MSLDC approved the proposed revision and accordingly, scheduled generation from LMEL to Petitioners was reduced to zero from 12 October, 2021 to 31 October, 2021

3.11 In order to fulfil their obligations as Distribution Licensees, Petitioners opted to procure their entire power requirement from the Power Exchange platforms for the period from 11 October, 2021 to 31 October, 2021. During this period, the rates being discovered on the Exchanges were significantly higher than the normal range on account of multiple factors

3.12 The total quantum, total cost and weighted average rate of such power purchase is given in the Table below

Period	Name of Licensee	Total Quantum of Power (kWh)	Total Cost (Rs.)	Avg. Cost (Rs/kWh)
11.10.2021 to 31.10.2021	MBPPL	2588756	19901501	7.69
	GEPL	1241403	9635469	7.76
	KRCIPPL	860824	7049545	8.19

3.13 While going through the schedules of LMEL, it was observed that LMEL (the source of power for Petitioners), had been selling up to 22 MW since 11 October, 2021 to an intra-State entity as well as on the Exchange platform, which also includes the contracted capacity allocated to Petitioners for the month of October, 2021

3.14 Accordingly, Petitioners referred the above matter and their observations vide letters dated 22 October, 2021 to MSLDC requesting MSLDC to conduct a detailed investigation in the said matter.

3.15 On 25 October, 2021, Petitioners sent a letter to KEIPL regarding the third-party sale by Generator, despite declaring unavailability due to coal shortage. On 26 October, 2021, KEIPL replied that it is agreeable to pay liquidated damages due to short-supply as per Clause 9 of the PPA.

3.16 With effect from 1 November 2021, KEIPL has arranged power supply to Petitioners from BSES Yamuna Power Limited (BYPL) as an alternate source as per the terms of the PPA

3.17 A joint meeting was held on 22 November, 2021 with Petitioners, KEIPL, and the Generator, viz., LMEL by MSLDC and were directed to submit their comments on the issues raised by Petitioners.

3.18 Thus, due to the non-availability of power from KEIPL, Petitioners have collectively incurred additional cost of Rs. 2.17 Crore with reference to the existing PPA rate of Rs. 3.18/kWh, on account of purchase of power from Power Exchanges during the period from 11 October, 2021 to 31 October, 2021.

Sl.	DISCOM	Quantum (kWh)	Actual Cost (Rs. Cr.)	Avg. Rate (Rs/kWh)	PPA Rate (Rs./kWh)	PPA Cost (Rs. Cr.)	Addnl. Cost (Rs. Cr.)
		(a)	(b)	(c)	(d)	(e=a x d)	(f=b-e)
1	MBPPL	2588756	1.99	7.69	3.18	0.82	1.17
2	GEPL	1241403	0.96	7.76	3.18	0.39	0.57

3	KRCIPPL	860824	0.70	8.19	3.18	0.27	0.43
	<b>TOTAL</b>	<b>4690983</b>	<b>3.66</b>	<b>7.80</b>	<b>3.18</b>	<b>1.49</b>	<b>2.17</b>

3.19 As per the terms of the PPA, KEIPL is liable to pay liquidated damages to the extent of non-supply beyond allowed limits. Petitioners have raised the claim of liquidated damages for the shortfall in supply of contracted quantum for the month of October 2021, as under:

Sl.	DISCOM	Liquidated Damages (Rs. Lakh)
1	MBPPL	11.40
2	GEPL	5.62
3	KRCIPPL	3.97
	<b>TOTAL</b>	<b>20.99</b>

These amounts have been recovered from the KEIPL through adjustments in the power purchase invoices for the month of November 2021

3.20 Thus, the net additional power purchase incurred by Petitioners due to power purchase from Power Exchanges is shown in the Table below:

Sl.	DISCOM	Additional Power Purchase Cost*	Liquidated Damages	Net Additional Power Purchase Cost
		(a)	(b)	(c=a-b)
1	MBPPL	1.17	0.11	1.05
2	GEPL	0.57	0.06	0.51
3	KRCIPPL	0.43	0.04	0.39
	<b>TOTAL</b>	<b>2.17</b>	<b>0.21</b>	<b>1.96</b>

3.21 Hence the Commission is requested to approve the net additional power purchase cost incurred by Petitioners for reasons beyond their control.

3.22 In accordance with the MERC MYT Regulations, 2019 and directions of the Commission from time to time regarding the FAC Fund, Petitioners are allowed to recover the additional power purchase cost incurred over the period from 11 October, 2021 to 31 October, 2021 through the FAC mechanism, subject to post-facto approval of the Commission.

3.23 Net additional power purchase cost to be recovered through the FAC mechanism works out as shown in the Table below:

Sl.	DISCOM	Additional Power Purchase Cost	Liquidated Damages	Net Additional Power Purchase Cost
		(a)	(b)	(c=a-b)
1	MBPPL	0.91	0.11	0.80
2	GEPL	0.44	0.06	0.39
3	KRCIPPL	0.35	0.04	0.31
	<b>TOTAL</b>	<b>1.71</b>	<b>0.21</b>	<b>1.50</b>

3.24 MBPPL, GEPL and KRCIPPL have created FAC Funds. The additional power purchase cost in October 2021 has accordingly been adjusted as under:

Sl. No	DISCOM	Opening FAC (Fund) Oct. 2021	FAC For the month of Oct 2021	Opening FAC (Fund) Nov. 2021	FAC to be recovered from the consumers in Nov.2021	Closing FAC (Fund) /FAC carried forward
1	MBPPL	(0.376)	0.853	0.474	0.338	0.136
2	GEPL	(0.978)	0.408	(0.57)	NIL	(0.57)
3	KRCIPPL	(1.838)	0.329	(1.509)	NIL	(1.509)

3.25 Thus, in case of GEPL and KRCIPPL, there is still FAC Fund balance after adjustment of additional power purchase cost of October 2021, whereas, for MBPPL after adjusting the accumulated FAC Fund, the balance amount has to be recovered from consumers in the month of November 2021 and December 2021, on account of the 20% FAC limit as per the MERC MYT Regulations, 2019.

3.26 In view of above, KRC DISCOMs requested the Commission to approve the additional cost of power purchase incurred over the period from 11 October, 2021 to 31 October, 2021 for reasons beyond their control and to accord consent for the adjustment of the additional cost with the balances against the respective FAC Fund and levy of FAC for the balance amount, up to the limit of 20% of Variable Charges.

4. MSLDC in its report dated 21 December, 2021 submitted to the Commission [which was circulated to parties subsequent to hearing in this matter held on 25 March 2022] on the complaint received by Petitioners for revision of Short-Term open access (STOA) transactions between Petitioners and KEIPL and subsequent sale of power through Indian Energy Exchange (IEX) by the generator. After going through the complaints made by the buyers and the replies received from seller and trader, MSLDC has made following observations in the report.

a. *KEIPL had submitted in the capacity of trader, three STOA applications in respect of GEPL, MBPPL, and KRCIPPL for the month of October 2021 ( 1 October, 2021 to 31 October, 2021). The same have been approved by MSLDC on 30 September, 2021 for GEPL and KRCIPPL and on 1 October, 2021 for MBPPL.*

b. *Thereafter KEIPL had submitted application on 9 October, 2021 for revision of corridor to zero MW from 11 October, 2021 to 31 October, 2021. As the application was consented by both buyer and seller, MSLDC has processed the application and revised the corridor from 12 October, 2021 to 31 October, 2021 as per Transmission Open Access Regulations (TOAR), 2016.*

c. *On examining the documents submitted by buyers, it is noticed that Trader (KEIPL) has quoted the reason of constraint of coal availability in the market.*

- d. Seller (LMEL) obtained standing clearance from MSLDC by making separate application on 11 October, 2021 for the period of 12 October, 2021 to 31 October, 2021.*
- e. It is evident from the above that the same seller who had not supplied power to buyer as per original application during the period 12 October, 2021 to 31 October, 2021 has scheduled power in exchange for the same period.*

**5. At the time of E-hearing held on 25 March, 2022**

- 5.1 Advocate of the Petitioner explained the background of the Petition and stated that the Petition is not against any contempt or allegations on the other parties, but it is restricted to the approval of additional power procurement expenses and recovery of the same through FAC Mechanism. In reply to the query of whether full differential amount can be recovered from defaulting party, she stated that as per terms and conditions of PPA only liquidated damages are recoverable and same have been recovered from KEIPL. If it is found at later stage that certain gaming/malpractice had happened during the transactions in the month of October 2021, separate petition would be filed as per applicable law.
- 5.2 Advocate of KEIPL stated that he received the copy of the Petition Day before the hearing and requested 2 weeks' time to make submissions in this regard. He further stated that he was a trader in the contract with Petitioners and having back-to-back agreement with LMEL as a generator supplier. Petitioners was intimated well in time for non-supply of power during the month of October, 2021 upon the communication received from the generator. Further, KEIPL paid liquidated damages as per PPA for the non-supply of power. Penalising the trader for the full differential amount would be tantamount to the deviation of contract. He further stated that the generator is a vital party in this Petition and needs to be impleaded. He further assured to file copy of back-to-back agreement entered with the generator in this matter.
- 5.3 MSLDC stated that it received the copy of the Petition Day before the hearing and requested 2 weeks' time to make submissions in this regard. MSLDC further stated that it had submitted the report to the Commission in December, 2021 on the complaint received from Petitioners about sale of power on power exchanges by LMEL during zero scheduling in October 2021. The Commission enquired with MSLDC as to how the open access was allowed to LMEL when zero schedules were sanctioned during October, 2021. MSLDC stated that it would file its written submissions in this regard. The Commission directed MSLDC to submit detailed submission in this respect.
- 5.4 Having heard the parties, the Commission opined that although relief sought in this Petition was limited to allowing pass-through of higher expenses on power procurement, the root cause for such increased expenses also needed to be scrutinised in detail. As LMEL was involved in the transaction, the Commission deemed it appropriate to direct Petitioner to implead LMEL as Respondent in this matter and

serve a copy of its Petition on it. The Commission directed KEIPL and MSLDC to serve the copies of their response to the petition to LMEL. Further, the Commission directed KEIPL and MSLDC to file their additional submissions and serve the same to Petitioners and Lloyd. After receipt of such submissions, parties were allowed to file their Rejoinder / additional submission / Reply, if any.

**6. MSLDC in its submission dated 8 April, 2022 has stated as follows: -**

- 6.1 Petitioners have been purchasing power from KEIPL in accordance with the PPA entered and approved by the Commission vide Order dated 30 June, 2021 in Case No 69 of 2021 from 1 July, 2021 to 30 June 2022. Petitioners have purchased partial power of its total demand through KEIPL and balance from Power Exchange for the month of October, 2021.
- 6.2 MSLDC had received three STOA applications from KEIPL in the capacity as Trader for seller as LMEL- and buyers as Petitioners for the month of October, 2021. All three applications were processed and approved within the timelines stipulated under TOAR Regulation 2016. Accordingly, power was scheduled to respective buyers.
- 6.3 KEIPL had submitted application on online portal on 8 October, 2021 for revision in corridor w.e.f. 11 October, 2021 to 31 October, 2021 for Petitioners. Said applications were received at 17.54 Hrs of 8 October, 2021 i.e., after 17:00 Hrs and hence the said applications are considered on 9 October, 2021 for processing as per Clause no. (5.4) of MSLDC procedure for reservation of Intra State Capacity of STOA
- 6.4 After approval of corridor revision, LMEL had applied for standing clearance for sale of power of 20 MW on 11 October, 2021. With due verification of availability of corridor and Ex-Bus capacity of generator, MSLDC had processed application of IEX NOC (Standing Clearance) to LMEL w.e.f. from 12 October, 2021.
- 6.5 MSLDC had received email on dated 9 October, 2021 from LMEL regarding declaration of availability for 10 October, 2021. Accordingly, MSLDC has properly scheduled power to Petitioners for 10 October, 2021. Further MSLDC had received email on 10 October, 2021 at 11:09 Hrs from LMEL regarding declaration of availability for 11 October, 2021 to buyers i.e Petitioners, M/s Eon Kharadi Infrastructure Pvt Ltd and M/s RIL. Thereafter on 10 October, 2021 at 11:35 Hrs, MSLDC had received another email from LMEL for updating the schedules of Petitioners to zero and keeping schedule of M/s Eon Kharadi Infrastructure Pvt Ltd and M/s RIL same as per original schedule
- 6.6 From the email correspondence between KEIPL, LMEL and Petitioners it is observed that, Petitioners has not accepted the schedule of power on 11 October, 2021 from seller (LMEL) and procured power from Exchange for 11 October, 2021. Petitioners have bought power from Power Exchange in spite of availability of contracted power from LMEL for 11 October, 2021.



- 6.7 LMEL has not sold the contracted power of Petitioners (around 10.13 MW) to Power Exchange on dated 11 October, 2021. It can be ascertained from the implemented schedule dated 11 October, 2021.
- 6.8 On 25 October, 2021 MSLDC has received complaint letters from Petitioners regarding revision in schedule by the seller against the short-term bilateral contract and subsequent sale of the capacity on exchange platform. MSLDC has carried out detailed enquiry in this matter and submitted report to the Commission on 24 December, 2021. MSLDC has taken due cognizance of the complaint raised by Petitioners.
- 6.9 LMEL was scheduled and despatched to M/s EON Kharadi Infrastructure Pvt Ltd for the entire month of Oct 2021 as per approved STOA application. Petitioners having full knowledge of market position have given consent to revise the corridor to zero on the application of KEIPL without asking for alternate power arrangement.
7. **LMEL in its submission dated 4 May, 2022 has stated as follows:**
- 7.1 LMEL is not a proper and necessary party. There is no contractual relationship between LMEL and Petitioners. No relief has been sought by Petitioners in the Petition against LMEL. None of the notices/ letters issued by LMEL have been brought under challenge by Petitioners. LMEL has no privity in the PPA entered between KEIPL and Petitioners. There is no tripartite agreement between the trader, seller and ultimate buyer so as to impose penalty on seller. LMEL relied on Hon Supreme Court Judgment *Katsurei in Vs Iyyamperumal & Ors (2005) 6 SCC 733* for the necessary party in the Petition.
- 7.2 LMEL has only contractual relationship with KEIPL by way of PPA executed on 10 September, 2021 for supply of scheduled power of 16 MW on RTC basis for the month of October, 2021 and LMEL has honoured all the obligations. LMEL cannot be saddled with the burden of contractual liabilities in respect of a PPA executed between KEIPL and Petitioners.
- 7.3 LMEL terminated the PPA dated 10 September, 2021 via notice dated 6 October, 2021 as per clause 22 of PPA stating the reason that the supply of power was unfeasible due to constraint/ less availability of coal and prevailing situation in coal market which was not within the control of LMEL. LMEL also paid the compensation to KEIPL as per clause 16 of PPA for less supply/ off take. Therefore, LMEL acted well within the contractual obligations. KEIPL even acknowledged the existence of coal crises in the month of October in their reply.
- 7.4 Subsequently, LMEL has applied for standing clearance for sale of power up to 20 MW on 11 October, 2021 and after due verification it was allowed from 12 October, 2021. Power from LMEL has been despatched and scheduled to EON Kharadi for the entire

month of October, 2021 as per approved STOA application and no contracted power of Petitioners has been sold on power exchanges on 11 October, 2021.

7.5 In view of above submissions, there exists no valid grounds or reasons for impleadment of LMEL as a necessary party and accordingly LMEL cannot be forced to comply with a contract in which it has no privity.

8. **KEIPL in its submission dated 5 May, 2022 has stated as follows: -**

8.1 After the completion of the competitive bidding process and after approval order dated 30 July, 2021 of the Commission; KEIPL entered into a short-term agreement with Petitioners for the supply of power up to 14 MW a rate of Rs. 3.18 per unit wherein the source of power as per the bid was the Power Department Government of Sikkim (Generator).

8.2 As per clause 3.5 of the PPAs KEIPL has been sourcing Power from alternate sources with prior consent and approval of Petitioners as per the approved tariff. In the present case it was sourcing power from LMEL to meet the requirement of Petitioners as requested on month-to-month basis. Accordingly, KEIPL and LMEL entered into PPAs on month-to-month basis as per the requirements for the specific months. Similarly, upon Petitioners' Request for supply of power for the month of October, 2021, KEIPL entered into a PPA with LMEL on 10 September, 2021.

8.3 LMEL communicated to KEIPL about its inability to run its plant from 11 October, 2021 to 31 October, 2021 on account of constraints in coal availability which was subsequently communicated to Petitioners with immediate effect. On the same day, KEIPL submitted the application for revision in approved schedule for the period from 11 October, 2021 to 31 October, 2021 through the online portal of the MSLDC. Accordingly, the MSLDC approved the proposed revision and scheduled generation from LMEL to Petitioners was reduced to zero from 12 October, 2021 to 31 October, 2021.

8.4 KEIPL took all the necessary steps towards honouring its obligations as envisaged in the PPAs to the best of its capabilities in assisting Petitioners in such a time of crisis, however, as a consequence of the acts of the generator i.e. LMEL, which at best could be a breach on its part, KEIPL agreed to pay the damages as envisaged under the contract. KEIPL being a mere facilitator between the seller and the consumer, could not have ascertained such crisis in advance and hence cannot be saddled with the burden of non-scheduling of power by the generator which was essentially allocated to Petitioners.

8.5 Non-scheduling of Power from the Generator is nothing but a Force Majeure condition on account of which KEIPL was unable to ensure scheduling of power to Petitioners in the month of October, 2021, which was again duly informed to the Petitioners vide letters dated 26 October, 2021 thereby stating that tremendous efforts are being made to

source power from alternate sources. Further in order to honour the terms of the said PPAs even agreed to pay the Liquidated damages without any protest, which clearly shows that KEIPL always acted in a bona-fide manner.

8.6 As per Clause 9.3 of the PPAs, KEIPL has already paid an amount of Rs. 20,99,299/- as liquidated damages which is the upper limit in terms of PPA. KEIPL cannot be forced to pay beyond 20% of the Tariff per kWh as contractually agreed between the parties.

8.7 It is a well settled law that the damages to be paid by a party under the contract cannot be unlimited if there exists a capping/upper limit which is mutually/contractually agreed between the Parties. For this KEIPL has referred to Hon'ble Supreme Court Judgment in *Kailash Nath Associates vs. Delhi Development Authority, 2015 (4) SCC 136*.

8.8 It has to be seen whether the generator has followed the norms of Ministry of Power by scheduling the power allocated to Petitioners in the exchange to other consumers. If not, then KEIPL cannot be solely held liable for the acts of the Generator and saddled with the liabilities thereof.

9. **Petitioners in its rejoinder dated 5 May 2022 to MSLDC's reply dated 8 April 2022 has stated as follows:**

9.1 MSLDC was well aware of the letter dated 8 October, 2021 by KEIPL to the Petitioner for revision to zero. In fact, KEIPL in its submission dated 1 December, 2021 before the MSLDC has stated that the generator could not schedule the power and no reasons have been put by KEIPL for such non scheduling of power by the generator, i.e., LMEL. Further to the same, the submission of LMEL before the MSLDC is that LMEL is not bound to supply to the Petitioner as the PPA dated 10 September, 2021 between the KEIPL and LMEL was terminated by the LMEL. No clarity is given by the LMEL as to when the PPA dated 10 September, 2021 was terminated. MSLDC is trying to obfuscate the facts by putting the burden on the Petitioner on its consent for revision to zero.

9.2 LMEL had applied for standing clearance for sale of power of 20 MW on 11 October, 2021 which shows that the reason cited by KEIPL about non- availability of coal for the revision in schedule to the Petitioners from 11 October, 2021 to 31 October, 2021 was not the reason but instead it wanted to sell the power elsewhere.

9.3 After submission of consent by the Petitioner on MSLDC portal on 10 October, 2021 KEIPL at the last moment vide its email dated 10 October, 2021 at 11:11 hours offered the partial availability of power supply from LMEL only for the delivery date of 11 October, 2021. This revised offer of power supply from KEIPL at the last moment is on account of the fact that LMEL did not receive the consent on time from MSLDC to sell its power on the Exchange for the delivery dated 11 October, 2021. Therefore, Petitioner's email dated 10 October, 2021 at 11.17 a.m. is not applicable as consent for

revision request by KEIPL as MSLDC had already accepted the request of KEIPL dated 8 October, 2021 (processed on 9 October, 2021) on its online portal.

9.4 A detailed investigation in this matter is required. The respective roles of the stakeholders need to be undertaken in a separate proceeding to unearth whether the scheduling and despatch in the State took place in accordance with the contract executed by the parties. This aspect may also be required to be seen and addressed in light of the fact that MSLDC refuses to take on record any “conditional” acceptance / revision.

9.5 Further, MSLDC’s reply is silent about the sale of power contracted to the Petitioners on Power Exchange, from 12 October, 2021 to 31 October, 2021. However, as per its Report dated 24 December, 2021, MSLDC has confirmed that “It is evident from the above that the same seller who had not supplied power to Buyer as per original application during the period 12.10.2021 to 31.10.2021 has scheduled power in exchange for the same period”.

**10. Petitioners in its rejoinder dated 5 May 2022 to KEIPL’s reply dated 5 May, 2022 has stated as follows:**

10.1 KEIPL had been supplying power to the Petitioners from the Generator LMEL as an alternate supply arrangement from the commencement of the term of the PPA i.e. from 1 July, 2021.

10.2 As per MSLDC report, seller did not supply the power to the Petitioner for the period from 12 October, 2021 to 31 October, 2021 and has scheduled power in Power Exchange for the same period. Hence the contention of the KEIPL on constraints of power supply is incorrect and it was the KEIPL who had to arrange the power from the alternate source for supply to the Petitioners.

10.3 Petitioner denies the contention of KEIPL that the non-scheduling of Power from the Generator is nothing but a Force Majeure condition. KEIPL is urging Force Majeure to support the cause of LMEL while offering liquidated damages upfront without any demur. This in fact reveals the gaming undertaken by entities like KEIPL, LMEL and others who breach the sanctity of agreements. This would not have been possible without the dereliction of statutory duty cast upon the MSLDC.

**11. Petitioners in its rejoinder dated 5 May 2022 to LMEL’s reply dated 4 May, 2022 has stated as follows:**

11.1 The alternate source (i.e., LMEL) allocated by KEIPL to the Petitioners had continued to sell the power on Exchange platform / other source in the month of October 2021 even after communicating that the Generator viz., LMEL was unable to run its plant from 11 October, 2021 to 31 October, 2021, on account of the constraints in coal availability in the market.

11.2 LMEL on one hand is submitting that there was power shortage primarily due to supply crunch of coal and on the other hand it has sold the contracted power of the Petitioners on exchange platform. Hence, the submission of LMEL is contradictory and it shows mala fide intentions of LMEL not to supply the power to the Petitioners and has forced the Petitioners to purchase the power through other sources / power exchange which has ultimately led the Petitioners to incur the additional power purchase cost.

11.3 There are inconsistencies in the submission made by LMEL and KEIPL on the reason for not supplying power to the Petitioner and ought to be therefore considered for further investigation.

**12. At the time of E- hearing held on 2 September, 2022**

12.1 Advocate for LMEL requested for adjournment. The Commission rejected such request as it was received very late in the evening of day before the hearing. However, the Commission allowed liberty to LMEL to file written submissions on the submissions made by other parties during the hearing.

12.2 The Commission directed KEIPL to file its written submission about its conduct in enforcing the contractual terms with the LMEL including the details about the liquidated damages recovered from LMEL for non-supply of power under the PPA and whether it had continued its business transaction with LMEL post October 2021.

12.3 Petitioner was allowed to file its written submission after filing of submission by KEIPL.

**13. KEIPL in its written submissions dated 8 September, 2022 has stated as follows: -**

13.1 KEIPL reiterated the submission already made in reply dated 5 May 2022 before the Commission.

13.2 Considering the inability of LMEL to supply power and in order to be able to serve under the terms of the PPA in terms of future exigencies which may arise, KEIPL sourced power from BSES Yamuna Power Limited for supply of the same to the Petitioners for the month of November, 2021, December, 2021 and January, 2022.

13.3 Inability to supply power as communicated by LMEL, was immediately informed to the Petitioners by KEIPL, thereby invoking the Force Majeure clause under the PPAs. However, the same was reverted by the Petitioners thereby declining the said invocation of the Force Majeure Clause. Subsequently the same was informed to LMEL vide letter dated 20 October, 2021 wherein it was suggested to LMEL to avoid indulging in the practice of Gaming in terms of the advisory issued thereof by the Ministry of Power.

- 13.4 The PPA dated 10 September, 2021 for supply of power for the month of October, 2021 was terminated by LMEL vide letter dated 06 October, 2021 wherein as per clause 16 of the said PPA, LMEL was agreeable to pay compensation on account of less supply/off-take. Accordingly, the said damages were calculated to amount to a total of Rs. 32,65,744.20/- for 16MW of the contracted capacity. Though the total contracted capacity for the Petitioners in the relevant month was 14 MW, a variable quantum of power was scheduled so as to substantiate in case of any exigency and thus the amount of compensation received from LMEL was calculated to be more than what has been discharged to the Petitioners by KEIPL in accordance with the terms of the PPA executed between the Petitioners and KEIPL.
- 13.5 There being no relief sought against KEIPL, any liability arising out of the present arrangement cannot be saddled upon KEIPL by way of adjudication of the present Petition as the contrary shall result into discharge of such judicial functions which are ex-facie not available to the Commission under the Law.
- 13.6 As clause 9.3 of the PPAs executed between the Parties, KEIPL has already paid an amount of Rs. 20,99,299/-, the same being the ceiling/upper limit of the damages that can be paid for the period during which the power was not scheduled. If any further liability is saddled upon KEIPL, the same shall exceed the capping/ceiling of the damages that can be claimed under the agreed terms of the contract thereby being completely arbitrary and inconsistent with the very intent of clause 9.3 of the PPA.
14. **LMEL in its written submissions dated 8 September, 2022 has stated as follows: -**
- 14.1 LMEL reiterated the submission already made in reply dated 4 May 2022 before the Commission.
- 14.2 LMEL has terminated PPA dated 10 September, 2021 with KEIPL on the coal crisis reasons only. Because the coal became expensive and it became unviable for LMEL to generate and supply power at the tariff/rate agreed with KEIPL. Pursuant to the termination of the said PPA with KEIPL, LMEL has paid penalty of Rs. 21 Lakhs as per the provisions of clause 16 of the said PPA.
- 14.3 The nature of the Petition is such that no relief can be granted to the Petitioners as there is no contractual relationship between the Petitioners and LMEL.
- 14.4 LMEL was ready to generate and supply the electricity to the ultimate buyers at revised rates subject to the constraint on coal availability and in pursuance of the same, KEIPL was communicated the offer of revised rates for supply of electricity. After the communication to KEIPL, it was the right that rested with the Petitioners to exercise the option of giving proposal of new rates to make the contract feasible for all the concerned parties. However, there was no such positive act on part of the Petitioners, and in a complete volte-face they are turning around the situation and indulging in

approbate and reprobate in complete contradiction to the fact that they had given an explicit consent to surrender the corridors and make the power supply zero.

14.5 To the point of supplying the electricity to ‘M/S EON Kharadi Infrastructure Pvt. Ltd.’, it is submitted that KEPL had approached LMEL on behalf of EON (that exercised the right of proposing new rates to make the contract feasible) with a proposal of revised rates which was later approved and EON was provided electricity supply between 11 October, 2021 to 31 October, 2021.

15. **Petitioners in its written submissions dated 15 September, 2022 has stated as follows: -**

15.1 Petitioner reiterated submissions already made in its Petition and Rejoinders.

15.2 The decision of the Petitioners for providing consent to Zero Declared Capacity was to avoid any uncertain situation out of no-supply of power from KEIPL and to avoid non-compliance towards grid operation requirements in case of no source generation being available, as admittedly communicated to the Petitioners by KEIPL on 8 October, 2021. The Petitioners refute the claims of MSLDC that they had given consent to the zero schedule out of their own will.

15.3 The Petitioners are strictly adhering to the MERC (State Grid Code) Regulations, 2020 for its grid operations and have maintained the disciplined approach while ensuring power supply to the end consumers. The Petitioners had switched on the entire demand of IT/ITES SEZ to DG sets in cases of no schedule availability from trader/generator or non-clearance of volume on Exchange, in order to ensure grid security and grid discipline.

15.4 MSLDC is silent on the KEIPL’s mis-declaration of the availability/capacity from the alternate source, i.e., LMEL, even after written complaint filed by the Petitioners, though the same is mentioned in MSLDC report dated 24 December, 2021.

15.5 The Petitioners did not accept the submission of MSLDC that they did not accept the power from LMEL even though LMEL power, was available for supply on 11<sup>th</sup> October 2021 based on the facts that transpired on and from 8 October, 2021. The action and complicity of MSLDC in making allegations against the Petitioners for allegedly not scheduling from LMEL (Generator) when the PPA had already been terminated on 6 October, 2021 and when MSLDC had already received the request for rescheduling qua the Petitioners from 11 October, 2021 to 31 October 2021 itself, speaks volumes of infringement of the powers under Section 32 of the EA, 2003.

15.6 The PPA is between Petitioners and KEIPL and LMEL has no privity of contract with the Petitioners. A bare perusal of the PPA between KEIPL and LMEL clearly shows that this PPA is not a back-to-back PPA with the PPA between KEIPL and Petitioners.

- 15.7 Petitioners had filed a grievance under Regulation 55.1 of the State Grid Code, on 22 October, 2021 itself, on becoming aware that the power contracted to Petitioners was being scheduled to another entity/Exchange through alternate corridor. MSLDC did not take any immediate action against KEIPL/LMEL and held the meeting on the complaint filed by the Petitioners after 1 month, i.e., on 22 November, 2021.
- 15.8 The MSLDC Report clearly concludes that KEIPL has cited coal availability constraints for the zero schedule and that the same seller who had not supplied power to Buyer as per original application during the period 12 October, 2021 to 31 October, 2021 has scheduled power in Exchange for the same period.
- 15.9 MSLDC is the apex body for ensuring integrated operations of the power system in the State. Optimum scheduling and despatch of electricity within a State in accordance with the contracts, requires complete knowledge of the contracts entered into between the Parties. MSLDC cannot feign ignorance of the arrangements / contracts. Further, awareness of contracts contemplates knowledge of actions based on the contracts by parties to the contracts. Energy accounting of the quantity of electricity transmitted through the State grid can be maintained only if all PPAs are known to MSLDC. Therefore, this clearly translates into complete knowledge of contracts by MSLDC.
- 15.10 MSLDC is the grid regulator of the State with wide powers to curb even speculation / gaming at the behest of a generator / trader. The sanctity of contracts needs to be considered and maintained by MSLDC in light of the wide powers conferred on it by sub-section 2 of Section 32 of the Act.

#### **Submission on KEIPL Reply dated 8 September, 2022**

- 15.11 The Petitioners are not aware whether KEIPL continued its business transaction with LMEL in other States and for other entities post October 2021 but KEIPL had supplied power to the Petitioners for the months of February 2022 and March 2022, that has been sourced from LMEL as an alternate source. Thus, it is clear that KEIPL has continued its business transaction with Respondent No. 3, LMEL, post October 2021.
- 15.12 For the first time in the present proceedings, in its pleadings KEIPL has shared the information relating to its communication with LMEL, wherein KEIPL has suggested to LMEL to “avoid indulging in the practice of gaming” in terms of the advisory issued by the Ministry of Power.
- 15.13 Several important inferences can be made from the above communication sent by KEIPL to LMEL, as under:
- a. KEIPL has accepted that the situation does not fall under ‘Force Majeure’. In such case, KEIPL was bound to arrange the power from an alternate source and schedule it in favour of the Petitioners, in terms of the PPA.



- b. KEIPL had also recognised and accepted that the Petitioners have given the consent to the revised zero schedule (i.e. Zero Declared Capacity) only on the condition that the capacity contracted to the Petitioners will not be scheduled to any third party or IEX.
- c. KEIPL has clearly stated that LMEL is breaching the regulatory norms, and if any penalty is imposed on KEIPL, it shall be passed on to LMEL.
- d. The Ministry of Power also took cognisance of the gaming being indulged in by market players.

15.14 The amount of compensation received by KEIPL from LMEL (Rs. 32.66 lakh) for the non-supply of power during the period from 11 October, 2021 to 31 October, 2021 was far greater than the compensation paid by KEIPL to the Petitioners (Rs. 20.99 lakh). Appropriate directions be passed in this regard as deemed fit by the Commission.

15.15 Further, Government of India has taken serious note of such malafide acts wherein in complete violation and infringement of the terms of the PPA, generators / traders have resorted to selling power in the market at higher prices while flouting their obligations under the PPA and amended the Short-Term Competitive Bidding Guidelines on 22 February, 2022

#### **Submission of Petitioners on LMEL Reply dated 8 September, 2022**

15.16 Although there may be no privity of contract between the Petitioners and LMEL, however, LMEL cannot escape from its accountability in this whole transaction.

15.17 LMEL has supported the contention of the Petitioners that it was sole responsibility of KEIPL to arrange alternate source power/generator in case Lloyd's was unable to fulfil the power requirements

15.18 There are certain factual inconsistencies between the submissions made by KEIPL and LMEL, with regard to the quantum of Liquidated Damages paid by LMEL to KEIPL. In its Written Submission, KEIPL has stated that it has received Liquidated Damages of Rs. 32,65,744/- from LMEL whereas LMEL has stated that it has paid Liquidated Damages of Rs. 21,00,000/- to KEIPL

15.19 LMEL has cited the reason of "infeasibility" of the Contract for termination of the PPA. However, the "infeasibility" referred to in Clause 22 of the above-said PPA is in the context of default or non-compliance of terms and conditions of the PPA by Parties. The PPA also provides that the PPA can be terminated without assigning any reason by serving one-month prior notice to the other party. It is obvious in this case that the termination was with immediate effect on 6 October 2021, and one-month notice was not given.

15.20 For the first time it has been placed on record in writing that LMEL was willing to supply power in case the rates were revised upwards. It is not understood how the Petitioners, being regulated entities, and having a PPA approved by the Hon'ble Commission, could have "*exercised the option of giving proposal of new rates*". It is not like the case of an Open Access consumer, who may offer revised rates to the generator, as long as the economics of the same was justified.

15.21 KEIPL communicated verbally for revision of rates for continuity of power to the Petitioners. During the joint meeting conducted by MSLDC between the Petitioners, KEIPL and LMEL on 22 November, 2021 at MSLDC, Kalwa, representative of LMEL had mentioned the commercial reason of continuation of supply to other entity, which had not been mentioned in any of MSLDC/KEIPL/LMEL replies till date and the MSLDC Report dated 24<sup>th</sup> December, 2021 is also silent about it. Thus, in reality there was no coal constraint as sought to be portrayed by KEIPL / LMEL.

15.22 As of now, the Petitioners have not taken any decision to pursue any other legal remedies against KEIPL for its non-supply of power during the period from 11 October to 31 October, 2021. The Petitioners will evaluate the pros and cons and costs of such legal remedies before proceeding on that route. If and when any such other legal remedies are / can be pursued by the Petitioners and if any relief is obtained by the Petitioners, the Petitioners undertake to pass through such award proceeds to their consumers.

**16. LMEL in its additional submission dated 24 September, 2022 has stated as follows:**

16.1 The Petitioners have filed the submission after the time period of 7 days without permission of the Commission and the same is liable to be rejected.

16.2 The quantum of liquidated damages paid by LMEL to KEIPL is Rs 3265744/- and it is mere a topographical error in the submission dated 10 September, 2022.

16.3 Petitioners raised the contention regarding the infeasibility in clause 22 of PPA between LEML and KEIPL when it possesses no local standi to decide on any interpretation of PPA. The concerns regarding the termination of PPA can be dealt only by the parties and Petitioners possesses no authority to question the in which the PPA was terminated.

16.4 In any contract it is the responsibility of the parties to the contract to act in every possible and prudent manner to make the contract sustainable. It was the responsibility of the Petitioners to have taken all the steps to make the contract alive and feasible for both the parties by discussing about the exercising of right of exploring alternative remedies including revised rates with KEIPL. The same enquiry was done by EON Kharadi regarding the new proposals, made the contract sustainable and alive and availed the supply of electricity from LMEL at revised rates.

- 16.5 The termination of PPA between LMEL and KEIPL on 6 October, 2021 has not been directly communicated to MSLDC by LMEL due to the reason that MSLDC has no concern with the termination of PPA. However, intimation for the same was given by KEIPL by surrendering the corridor to MSLDC in respect of the Petitioners by giving revision in schedule to zero from 12 October, 2022 to 31 October, 2022.
- 16.6 It is not for the Petitioners to decide whether there existed a coal shortage since the matter exclusively relates to LMEL and KEIPL. Coal shortage at that time was prevalent and this coal crises was faced by the whole country to the extent that the Government recognised the distressing situation and promised to work on the war footing to bring down the exorbitant prices of coal that were caused by coal shortage.
- 16.7 In view of the same situation, the revised prices were required to procure the coal and make the process of procuring and supplying electricity feasible for all the parties to the contract. Further no provision of fuel cost adjustment was present in the contract. Thus, when EON Kharadi came up with the revised proposal, power was supplied to it.

### **Commission's Analysis and Ruling**

17. Petitioners namely MBPPL, GEPL and KRCIPPL are deemed Distribution Licensees in its IT &ITeS Special Economic Zone (SEZ) located at Kalwa & Airoli in Thane Districts and Kharadi in Pune District, respectively.
18. The Commission vide its Order dated 23 January 2021 in Case No 231 of 2020 has approved proposal of KRC Discoms to undertake combined power procurement. Thereafter vide its Order dated 30 June 2021 in Case No. 69 of 2021, the Commission has adopted tariff of Rs 3.18 per kWh discovered through competitive bidding and approved PPAs between Petitioners and KEIPL, for supply of power for the period of 1 July 2021 to 30 June 2022.
19. As stated in the Petition, although KEIPL in its bidding has identified Power Department, Govt. of Sikkim as source of power supply, but from day one of the PPA till October 2021, KRC Discom has supplied power to the Petitioners from alternate sources i.e. LMEL.
20. Petitioners have filed this Petition for allowing passthrough of additional power purchase cost incurred during the period from 11 to 31 October 2022 due to non-supply of power from the KEIPL. Petitioner has computed such additional expenses as Rs. 1.96 crore after deducting liquidated damages of Rs.0.21 Crore already paid by KEIPL for short supply of power as per condition of PSA. The Commission directed impleadment of LMEL in this matter as LMEL was generator in the power supply transaction and is directly involved in the present matter.

21. During the course of this proceeding, Petitioners have contended that relief sought in the present Petition is limited to pass through of additional power purchase expenses during the period of 11 to 31 October 2022 and they are not seeking any adverse action against anybody. KEIPL has contended that it is trading licensee and hence its role in power purchase transaction is limited. It has already paid liquidated damages for short supply of power as per provisions of PPA. Hence, no further adverse action be taken against them. LMEL has contended that it is not party to the contract between the Petitioners and KEIPL, further Petitioner has not sought any relief against them, hence no action can be taken against them.
22. Having heard parties and considering material placed on records, the Commission frames following issues for its consideration:
  - a. Does the PPA restrict the compensation for short supply of power to Liquidated damages only?
  - b. Whether various steps/actions/ decisions taken by parties involved in transactions are as per provisions of Act/Regulations/PPA?
  - c. If not, whether this Commission can take action against defaulting party?
  - d. Under such circumstances, whether all additional expenses incurred by Petitioners need to be passed on to consumers?

The Commission is dealing with above issues in following paragraph.

**23. Issue A: Does PPA restrict the compensation for short supply of power to Liquidated Damages only?**

- 23.1 While praying for allowing the increased power purchase expenses during the period of 11 to 31 October 2021 on account non-supply of power under the PPA, Petitioners have contended that such additional expenses have been claimed after deducting liquidated damages recovered from KEIPL for such short supply of power during that period. Petitioners have contended that PPA does not provide provisions for any additional penalty / compensation for such short supply of power.
- 23.2 KEIPL has contended that PPA clearly stipulated payment of Liquidated Damages for short supply of power and it has already paid such LD amount and hence no further penalty be imposed on it. For this purpose, KEIPL has relied upon Supreme Court judgment in the matter of *Kailash Nath Associates Vs Delhi Development Authority*.
- 23.3 In this regard, the Commission notes that PPA dated 27 May 2021 signed by Petitioners with KEIPL has following provisions for short supply of power:

“9. Payment for Liquidated Damages for Failure to Supply the Instructed Capacity

.....

*9.3 In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% while continuing to pay open access charges as per the contract”*

As per above provision of PPA, any short supply above 15% of contracted energy shall be compensated at 20% of PPA tariff. The Commission notes that this provision of the PPA is as per ‘Guideline for Short-term Procurement of Power by Distribution Licensee through tariff-based bidding process’ dated 30 March 2016 notified by the Central Government under Section 63 of the Electricity Act, 2003.

- 23.4 The Commission notes that there is no other provision in the PPA related to penalty or further compensation for short supply of power. Under such circumstances, KEIPL has relied upon Hon’ble Supreme Court’s Judgment in the matter of *Kailash Nath Associates Vs Delhi Development Authority* which states that compensation cannot be more than Liquidated Damages agreed in the Contract. Relevant part of the said Judgment is reproduced below:

*“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-*

*1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. **In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.***

*2. ....”*

In view of above Supreme Court Judgment, compensation for short supply of power cannot be granted beyond the Liquidated damages agreed in the PPA.

- 23.5 In present case, LD amount has been paid by KEIPL and Petitioners have deducted it while claiming additional power purchase expenses for arranging alternate power in lieu of short supply of power.

23.6 In view of above, in normal circumstances, no further compensation for short supply of power can be ordered as per provisions of the PPA. However, in present case, short supply of power is not on account of non-availability of generating source but there is allegation that contracted generator has diverted such contracted power to other buyer. The Commission cannot ignore the fact that the rate of power available in the market during that period was high, and the contracted power was denied to the Petitioners. This shortfall in supply of contracted power necessitated the Petitioners to incur additional expenses, which now they have requested to be passed on to consumers. Thus, by alleged diversion of power and possible gaming, generator may have earned profit but if request of the Petitioner is allowed then consumers have to pay for additional expenses incurred by Petitioner. Hence, the Commission is of the opinion that this issue needs to be dealt with in subsequent paragraphs in further detail with the objective of protecting the interest of the consumers.

**24. Issue B: Whether various steps/actions/ decisions taken by parties involved in transactions are as per provisions of Act/Regulations/PPA?**

**Issue C: If not, whether this Commission can take action against defaulting party?**

**Issue D: Under such circumstances, whether all additional expenses incurred by Petitioners need to be passed on to consumers?**

24.1 The Commission notes that it is admitted fact that under the PPA dated 27 May 2021, from day one, KEIPL as a trader, is supplying power from alternate source. KEIPL has been signing monthly PPA with alternate source i.e. LMEL for supply of power to the Petitioners. In view of this, it is admitted fact that LMEL is not contracted under the PPA dated 27 May 2021 on back to back basis, but it is just an alternat source contracted on monthly basis.

24.2 Issue of short supply of power raised in the present Petition is limited to the period from 11 to 31 October 2021. STOA for supply of power from LMEL to Petitioners for the month of October 2021 was approved on 30 September / 1 October 2021. Thus a contract involving LMEL was existing for a period between 1 October to 31 October 2021. KEIPL communicated on 8 October 2021, requesting Petitioners for their consent for revision in schedule for the period from 11 to 31 October 2021 on account of LMEL's inability to supply power due to constraint in coal availability. Petitioners consented to such request and then went on to arrange power from other sources at additional expenses. However, Petitioners noticed that although LMEL had refused to supply power to the Petitioners on account of constraint in availability of coal, it was supplying power on the Power Exchange & to other buyers during the same period and hence Petitioner vide letter dated 22 October 2021 had filed complaint before the MSLDC. After enquiry, MSLDC vide letter dated 24 December 2021 filed Report before the Commission with following findings:

*“..... After going through the complaints made by Buyers and replies given by Seller and Trader, MSLDC is submitting its observations as below*

- 1) KEIPL had submitted in the capacity of trader, three STOA applications in respect of GEPL, MBPPL, and KRCIPPL for the month of Oct-21 (01.10.2021 to 31.10.2021). The same have been approved by MSLDC vide approval number MSLDC/STOA/INTRA/Oct-21/0825, 0828 and 0826 respectively. The copies of same are submitted herein as Annexure-3.*
- 2) Thereafter M/s KEIPL had submitted application on dated 09.10.2021 for revision of corridor to zero MW from 11.10.2021 to 31.10.2021. As the application was consented by both Buyer and Seller, MSLDC has processed the application and revised the corridor from 12.10.2021 to 31.10.2021 as per TOAR Regulation 2016.*
- 3) On examining the documents submitted by Buyers, it is noticed that Trader (M/s KEIPL) has quoted the reason of constraint of coal availability in the market. The copy of same is submitted herein as Annexure-4.*
- 4) Seller (M/s LMEL) obtained standing clearance from MSLDC by making separate application on dated 11.10.2021 for the period of 12.10.2021 to 31.10.2021.*
- 5) It is evident from the above that the same seller who had not supplied power to Buyer as per original application during the period 12.10.2021 to 31.10.2021 has scheduled power in exchange for the same period.***

*MSLDC herewith submits above observations to the hon'ble Commission as per Clause No. (55.1) of MERC Grid Code Regulation 2019.”*

It is important to note that above Report has been submitted under Clause 55.1 of MERC Grid Code Regulations 2019 which is reproduced below:

*“55.1 SLDC shall refer the Complaints regarding unfair practices, delays, discrimination, lack of information, supply of wrong information or any other matters to the Commission for redressal.”*

MSLDC while submitting its observations in its letter dated 24 December 2021 has not highlighted exact violation stipulated in Regulations 55.1 but has made an observation that Seller has not supplied power to buyer as per original application but has scheduled such power to power exchange during the same period. In the opinion of the Commission, such observation of MSLDC is pointing towards ‘unfair practice’ and as per Grid Code Regulations, the Commission has to redress such complaint of unfair practice. The Commission is also concerned about the possibility of MSLDC down playing the serious default on part of one of the contracting party (LMEL) and

also its own action of permitting the revised schedule for the same generator who have earlier conveyed its inability to generate electricity under the contract for supplying power to Distribution Licensee. .

24.3 LMEL in its submission in the present matter has stated that it has supplied power to power exchange after taking due approval. Further, its PPA with KEIPL was already terminated on 6 October 2021 and hence issue of it having not supplied power to Petitioner during 11 to 31 October 2021 did not arise.

24.4 The Commission notes that each party in their respective submissions have revealed certain aspect of the event of short supply of power during the period of 11 to 31 October 2021. To have comprehensive understanding of situation, the Commission has developed chronology of events based on documents submitted by all parties during this proceeding as follows:

Date	Events
10.09.2021	PPA between KEIPL and LMEL for supply of power up to 16 MW RTC from 1.10.2021 to 31.10.2021. Base rate at delivery point is Rs 3.05 per unit.
30.09.2021	Approval of STOA for KRCIPPL from 1.10.2021 to 31.10.2021 (Source generator LMEL)
30.09.2021	Approval of STOA for GEPL from 1.10.2021 to 31.10.2021 (Source generator LMEL)
1.10.2021	Approval of STOA for MBPPL from 1.10.2021 to 31.10.2021 (Source generator LMEL)
6.10.2021	Letter from LMEL to KEIPL regarding termination of Power Purchase Agreement dated 10.09.2021 between LMEL and KEIPL for the month of October, 2021 stating that <i>LMEL is not able to comply the supply of scheduled power mutually agreed upon up to 16 MW on RTC basis for the month of October, 2021. This is due to constraint in coal availability in the market which is not within the reasonable control of LMEL. In this regard as per clause 22 of PPA (Termination of Contract), the contract is now no longer feasible to LMEL. We shall be liable to pay the compensation as per clause 16 of PPA for compensation for less supply/ off-take.</i>
8.10.2021	Letter from KEIPL to the Petitioners regarding stoppage of power from 11.10.2021 to 31.10.2021 due to force majeure conditions stating the reason <i>“due to constraints in the coal availability in the market the generator is unable to run its power plant and consequently to schedule the power from 11.10.2021 to 31.10.2021, as such situation is not within the control of Kreate Energy (I) Private Limited”</i>
8.10.2021	Letter from Petitioners to KEIPL <i>denying the claim by KEIPL of the situation as force majeure event</i>
8.10.2021@17.54 Hrs	Online application from KEIPL to MSLDC for revision in corridor from 11.10.2021 to 31.10.2021
9.10.2021	Application from KEIPL for revision in corridor was processed by MSLDC
10.10.2021	Mail from Petitioners to KEIPL and MSLDC stating that <i>“While the response has been initiated by KRC DISCOMs to the particular communication at the same time consent has been uploaded on MSLDC portal for revision in power schedule from 11.10.2021 to 31.10.2021 as per requested from Kreate Energy. Please note that any cost arising to KRC discoms (including DSM/UI) on account of last moment change in schedule by KEIPL or its generator shall be on account of KEIPL and KRC discoms shall not be responsible for the same. As per clause 1.1 of PPA , the capacity under revision is for exclusive benefit of the KRC discoms and we anticipate that the seller shall not grant to any third party or allow any third partry to obtain any entitlement to the contracted capacity.</i>
MSLDC Ref No Oct 210355, Oct 210356; Oct 210357	Concurrence given by MSLDC for zero scheduling for the Petitioners from 11.10.2021 to 31.10.2021 as per format II



Date	Events
10.10.2021 @ 9.18 AM	Mail from KEIPL to LMEL of OA power scheduling for delivery date 11.10.2021 showing Buyers Eon Kharadi, Reliance Industries Ltd and the Petitioners.
10.10.2021 @ 11.09 AM	Mail from LMEL to KEIPL on power export schedule for 11.10.2021
10.10.2021 @ 11.11 AM	Mail from KEIPL to the Petitioners of OA power scheduling for delivery date 11.10.2021
10.10.2021 @ 11.17 AM	Mail from the Petitioners to KEIPL that the schedule is not applicable as consent to revision request has been granted through online MSLDC portal
10.10.2021 @ 11.25 AM	Mail from KEIPL to LMEL stating that as per trailing mail received from Petitioner, they have given the consent for revision
10.10.2021 @ 11.35 AM	Mail from LMEL to KEIPL for revised power export schedule for 11.10.2021 (Zero schedule for the Petitioners)
10.10.2021 @ 11.53 AM	Mail from LMEL to MSLDC for power export schedule on 11.10.2021
11.10.2021	Letter from MSLDC to KEIPL for acceptance of revision of schedule (Zero Schedule) from 12.10.2022 to 31.10.2022 on Request of KEIPL dated 10.10.2021
11.10.2021	Schedule showing Sale of 8.88 MW power from LMEL on power exchange.
12.10.2021	Corridor of the Petitioners was revised to zero w.e.f 12.10.2021 by MSLDC
20.10.2021	<p>KEIPL rejected LMEL's termination notice dated 6 October 2021 as follows:</p> <p><i>Further you have stated that this is a force majeure condition and not within your reasonable control &amp; you are not able to schedule the power through KEIPL but it has come to our knowledge that you are scheduling the power on Indian Energy Exchange (IEX) and this situation is out of force majeure &amp; can not be considered as force majeure and not acceptable to us.</i></p> <p><i>Further as you know that KEIPL is a power trader and fixing &amp; executing the Power sale agreement with buyers on the basis of agreement signed with generators and in this transaction, buyers have give its consent to revise the power only on this condition that LMEL will not schedule the power to any third party or IEX. ....</i></p> <p><i>Further in light of above fact, you are scheduling the power to third parties after invoking force majeure clause is breaching the regulatory conditions &amp; if Ultimate buyer impose any penalty, compensation on KEIPL we will pass it to LMEL.</i></p> <p><i>Further, in order to control the current market situation, it is advised as below by Ministry of power:</i></p> <p><i>"If any gaming is noticed on the part of the seller such as not supplying under PPA and selling in the market, it should be brought to the notice of the regulatory commission without any delay under intimation to the Ministry of power for immediate intervention."</i></p>
21.10.2022	Schedule showing Sale of 9.3 to 17.56 MW power from LMEL on power exchange.
22.10.2021	Complaint letter from Petitioners to MSLDC about revision in schedule by seller against short term bilateral contract and subsequent sale of the capacity on exchange platform
25.10.2021	Letter from Petitioners to KEIPL <i>to comply with the obligations as per terms and conditions of the contract; failing to which Petitioners are constrained to take all acts as it may deem necessary</i>
26.10.2021	Letter for KEIPL to the Petitioners stating that <i>coal shortage is today's force majeure situation globally and we are constantly trying hard to arrange power from alternate source. Further KEIPL is ready to pay liquidated damages as per clause 9 of PPA</i>
27.10.2021	Letter from Petitioners to KEIPL stating that <i>KEIPL has admitted the breach of the terms of the agreement including by claiming an inability to commit a reservation of the contracted capacity; KEIPL has admitted to curtailing the already short supplied quantum and further selling the same on the exchange platform. Accordingly, KRC DISCOMs are entitled to and shall proceed to invoke</i>

Date	Events
	<i>contract performance guarantee.</i>
1.11.2021	KEIPL supplied power to the Petitioners from 1.11.2021 to 31.1.2022 through BSES Yamuna Power Limited (Inter State Generator)

24.5 From the above chronology of events, the Commission observes as follows:

- a. Short-term open access for supply of power from LMEL to the Petitioners through KEIPL as trader is approved for period of 1 to 31 October 2021.
- b. On 6 October 2021, LMEL issues PPA termination notice to KEIPL relying on constraint in availability of coal as force majeure event.
- c. KEIPL requested for revision in schedule for the period from 11 to 31 October 2021 as generator, LMEL conveyed inability to supply power on account of constraint in availability of coal. Accordingly, with the consent received from the Petitioner, SLDC revised the schedule from LMEL to Petitioner for 12 to 31 October 2021 as zero.
- d. On application of LMEL, SLDC approved LMEL's request for sale of power to power exchange during the period from 12 to 31 October 2021. Power was offered to the Petitioner on 11 October 2022.
- e. While approving such request, MSLDC has failed to consider the fact LMEL's original schedule to the Petitioner was revised to zero because of constraint in availability of coal, whereas now for the same period, LMEL sought the permission for sale of power to power exchange.
- f. KEIPL vide its letter dated 20 October 2021 has rejected termination of PPA on account of force majeure claim as LMEL was generating electricity and supplying to power exchanges instead of the Petitioners. As KEIPL has not accepted termination notice, PPA between LMEL and KEIPL for supply of power to the Petitioners for the month of October 2021 was valid and enforceable. Further, in the same letter KEIPL advised the LMEL to desist from gaming.
- g. On 22 October 2021, Petitioners filed complaint against LMEL before MSLDC for diverting its contracted power to power exchange. MSLDC failed to act immediately for ensuring the sanctity of contracts which enabled LMEL to continue sale of power in the exchange. After its own detailed enquiry, in its report dated 24 December 2021, MSLDC observed that LMEL has not supplied power to buyer as per original application but has scheduled that power in the exchange during the same period.

24.6 From above, it is evident that for the month of October 2021, KEIPL has contracted LMEL for supply of power to the Petitioners. Although, LMEL has issued PPA termination notice, KEIPL has not accepted it and hence said PPA remained valid and

enforceable during the month of October 2021. Latter LMEL paid liquidated damages to KEIPL for non-supply of power under the PPA. At best, the PPA could have been treated as disputed but needs to be treated as enforceable for the month of October 2021. Further, it is admitted position that LMEL generated the power and supplied to power exchanges during the period of 11 to 31 October 2021 and hence the issue of constraint in availability of coal was not there or was falsely declared. The matter attains extreme concern since LMEL in its submission has also contended that due to increased cost of coal, it was become unfeasible to operate under the PPA and thereafter has supplied its generated power in the exchange. In this regard, the Commission notes that Hon'ble Supreme Court in Energy Watchdog matter has held that increase in cost of coal cannot be ground for force measure or frustration of contract. Relevant part of the said Judgment is reproduced below:

*“40. It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere do the PPAs state that coal is to be procured only from Indonesia at a particular price. In fact, it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. The fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order. It is clear that an unexpected rise in the price of coal will not absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff indicated was upon the generating company.*

.....

*45. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated.....”*

In view of above judgment of the Hon'ble Supreme Court, increase in cost of fuel/ coal cannot be the ground for non-performance of contract. Therefore, PPA dated 10 September 2021 signed between KEIPL and LMEL was valid and enforceable for its tenure of 1 to 31 October 2021.

24.7 The Commission also notes that while replying to LMEL's termination notice, KEIPL in its letter dated 20 October 2021, has specifically highlighted the following to LMEL:

*“Further in light of above fact, you are scheduling the power to third parties after invoking force majeure clause is breaching the regulatory conditions & if Ultimate buyer impose any penalty, compensation on KEIPL we will pass it to LMEL.*

*Further, in order to control the current market situation, it is advised as below by Ministry of power:*

*“If any gaming is noticed on the part of the seller such as not supplying under PPA and selling in the market, it should be brought to the notice of the regulatory commission without any delay under intimation to the Ministry of power for immediate intervention.”*

Thus, KEIPL has correctly raised concerns and was convinced that LMEL’s action of scheduling power to third party (power exchanges) without supplying to parties under original contract is breach of regulatory condition and it amount to ‘gaming’ as noted by the Ministry of Power. However, even after reproducing MoP’s directive in above letter, KEIPL has failed to bring such incidence of gaming to the notice of this Commission or MoP for immediate intervention.

24.8 The Commission notes that PPA dated 10 September 2021 signed between KEIPL and LMEL does not mention Petitioners in present case as ultimate buyer. However, subsequent short term OA permission granted by MSLDC for supply of power from LMEL to the Petitioners have established relationship between Petitioner and LMEL as ultimate buyer and generator. KEIPL being trader is responsible for arranging power to the Petitioner. Therefore, when it noticed that LMEL was diverting power contracted for Petitioners to third party, it should have immediately taken steps to stop such gaming activities.

24.9 The Commission further notes that to curb such gaming activities of diverting contracted power to third party to earn higher revenue, MoP vide notification dated 21 February 2022 has amended competitive bidding guidelines of short term procurement of power to include the following:

*“6.4 (vi) PPA proposed to be entered with the Selected Bidder(s) shall include necessary details on:*

***h. Consequences on Sale of Contracted Power to Third Party without consent of the Procurer***

- In case the Seller fails to offer the contracted power as per the Agreement to the Procurer and sells this power without Procurer’s consent to any other party, the Procurer shall be entitled to claim damages from the Seller for an amount equal to the higher of : (a) twice the Tariff as per the PPA for the corresponding contracted power; and (b) the entire sale revenue accrued from Third Parties on account of sale of this contracted power. These damages shall be in addition to Liquidated Damages as per*

*Para 6.4 (e ) of existing guidelines, for failure to supply the Instructed capacity.*

- *On a complaint of this effect by the Procurer to the concerned load dispatch centre, the Seller shall be debarred from participating in power exchanges and also from scheduling of this power in any short term / medium term/ long term contracts from that generating station for a period of three months from the establishment of default, in the complaint. The period of debarment shall increase to six months for second default and shall be one year for each successive default.”*

Thus, as per amendment dated 21 February 2022, in addition to the Liquidated Damages stipulated in earlier guidelines, procurer is entitled for claiming damages from seller in case seller diverts contracted power to third party without consent of procurer. Further for such gaming activity, seller can be subjected to action of three months of debarment from scheduling of power.

24.10 In present case, MSLDC in its report dated 24 December 2021 submitted to the Commission has clearly observed that *seller who had not supplied power to Buyer as per original application during the period 12.10.2021 to 31.10.2021 has scheduled power in exchange for the same period.* Hence, gaming has been clearly established in the present matter. However, consequential action to be taken on such gaming activity has been included in the guidelines only on 21 February 2022, whereas incidence of gaming in present case has happened in October 2021 i.e. prior to such amendment.

24.11 Therefore, even though gaming activity has been established, for concerned period, there was no provision under the competitive bidding guidelines for taking action against such incidence. Under such circumstances when certain issue is not governed by guidelines, the Hon'ble Supreme Court in its Energy Watchdog judgment has made following observations:

*“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The*

*reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”*

Thus, as per above judgment of the hon’ble Supreme Court, in a situation where competitive bidding guidelines do not deal with a given situation, the Commission needs to use its regulatory powers.

24.12 In the present case, Competitive bidding guidelines and provisions of PPA applicable at that point of time limits compensation to the Liquidated damages stipulated in the PPA. This may be because possibility of gaming was not envisaged at that point of time. But when such gaming activities became known, MoP has amended the Guidelines for providing compensation over and above the liquidated damages for any gaming activity. Therefore, now while dealing with gaming activity established in present matter, the Commission while using its Regulatory Powers cannot be restricted by the PPA provision of liquidated damages and thereby allow the person indulging into gaming to go scot-free at the cost of general consumers. Gaming is a serious offence and needs to be dealt with a heavy hand.

24.13 The Commission notes that based on application of KEIPL and with the consent of the Petitioners, MSLDC has revised open access schedule for LMEL to zero. Thereafter, LMEL through separate application requested MSLDC to allow its power sale to power exchange which is allowed by MSLDC based on availability of corridor. While allowing this application, MSLDC has ignored email from the Petitioners which clearly stated that its consent to revise schedule of LMEL was subject to condition that said contracted capacity is for exclusive use of Petitioners and should not be diverted to third party. This ignorance on behalf of MSLDC might be because the said email of the Petitioner was outside scheduling platform as the said platform does not allow submission of such email or conditional consents. Even

though, KEIPL was aware of such diversion of contracted power by LMEL it has not taken any concrete steps. Instead, KEIPL has soft paddled the serious issue of gaming and has offered the Petitioners to pay Liquidated Damages (Rs 20.99 lakh) for short supply of power as per PPA. Similarly, LMEL has paid Liquidated Damages of Rs. 32.66 Lakh under the PPA for short supply to KEIPL. Thus, it seems that LMEL has decided to divert contracted power to third party (power exchanges) as maximum penalty (liquidated damages) as per PPA is limited to 85 paise per unit whereas by selling such power-on-power exchanges it could have earned Rs. 3 to 16 per unit, the then prevailing range of rate in the power market. It is evident that KEIPL has also benefitted as it received Rs. 32.66 lakhs from LMEL while making payment of Rs. 20.99 lakhs to petitioner. It is an uncalled for conduct of a regulated entity, a trading licensee, in virtually facilitating a patently malafide transaction of its contracted generator, for petty gain through liquidated damage settlement mechanism.

24.14 The Commission notes that PPA between LMEL and KEIPL has been signed as per mutual agreement between parties and there is no provision in the PPA giving jurisdiction to the Regulatory Commission. However, this does not curtail jurisdiction granted upon this Commission by the Electricity Act, 2003 to regulate power procurement process and rate of distribution licensee. Also, the Commission is mandated with the responsibility of protecting the interest of the Consumers.

24.15 The Petitioners' power procurement transaction is regulated under the provisions of the Electricity Act, 2003. Thus the Power procurement plan depends upon PPA between LMEL and KEIPL and the Commission can and needs to regulate the process esp when there is an element of Gaming by LMEL and the other three stake holders (KEIPL, MSLDC and the Petitioner) are soft pedalling the issue. The Commission notes that KEIPL in its letter dated 20 October 2021 addressed to LMEL has clearly stated that in case any penalty is imposed by buyer on account of LMEL's diversion of power to third party, it shall recover the same from LMEL. Thus, KEIPL can protect its interest by recovering compensation amount from LMEL who have benefited from diversion of contracted power to third party.

24.16 The Electricity Act, 2003 mandates the Commission to protect the interest of consumers at the same time allow recovery of cost of electricity in reasonable manner. In present case, by diverting contractual power to third party, LMEL/KEIPL have acted against the spirit of the contractual provisions and earned undue benefit at the cost of consumers of the Petitioners. Hence, by using its regulatory power, the Commission deems it fit to direct KEIPL to compensate the Petitioners for excess power purchase expenses of Rs. 1.96 Crore incurred because of diversion of its contracted power. KEIPL shall make such payment to the Petitioners within 15 days from date of this Order.

24.17 As observed in the earlier part of this Order, the MSLDC in its report submitted to the Commission under Regulations 55.1 of the State Grid Code has pointed out unfair practice adopted by the seller in present case. The Commission notes that Regulation

50.2.9 of State Grid Code mandates the seller to make advance declaration of ex-power plant MW and MWh capability for next day by considering availability of fuel and water. In the present case, Seller (LMEL / KEIPL) has conveyed non availability of generator (LMEL) to the Petitioners on account of fuel issues and sought consent for zero schedule. After getting such consent for zero schedule, generator (LMEL) has declared day ahead availability for sale of power to Exchange. Although, KEIPL was aware of such diversion of power, it has not taken any action against LMEL. This is clear misuse / violation of provisions of Grid Cod and akin to the default stipulated under Regulation 54.1 of the State Grid Code for which MSLDC can initiate action for revocation of registration of sellers (LMEL/KEIPL) and non-scheduling of power as per Regulation 54.2 of the State Grid Code. However, the Commission in above para has directed defaulting parties to pay compensation for loss incurred by the Petitioners on account of unfair practice/ gaming adopted by seller. Therefore, such action of revocation of registration would be double penalty and hence is not warranted at this point of time. But, in case seller fails to pay such compensation within time limit stipulated above, MSLDC shall initiate action against KEIPL and LMEL as per Regulation 54.2 of the State Grid Code.

- 24.18 While giving above ruling the Commission is conscious of the fact that Petitioners in its Petition has not sought any relief against KEIPL and LMEL. But for the reasons explained above, after giving opportunity of being heard to KEIPL and LMEL, the Commission has issued above Order. After having established that gaming has happened, allowing the LMEL/KEIPL to retain undue benefit would be against the consumer interest.
- 24.19 In view of above ruling, relief sought in the present petition i.e. allowing such additional expenses as pass through to consumer through FAC mechanism becomes infructuous. However, the Commission notes that FAC mechanism for SEZs allows levy of variation in power purchase cost on monthly basis subject to post facto vetting by the Commission. During pendency of this case, said additional expenses must have been levied to consumers through FAC. Therefore, instead of reversing all such FAC computation, the Commission directs that once KEIPL has paid the amount as directed above, same shall be adjusted as rebate in upcoming FAC computation.
25. Having ruled as above, the Commission notes that said gaming has demonstrated shortcoming in MSLDC's processes which needs to put additional crosschecks to stop such gaming attempts in future. Further, when such complaint of gaming is received, after following due process, MSLDC shall act quickly to stop such gaming activity. Considering seriousness of the issue and to prevent recurrence of such incidences, the Commission directs its Secretariat to review processes/ procedure of MSLDC for avoiding such incidences of gaming. While doing so, issue relating to conditional consent and scheduling power to third party by generator for which zero schedule has been approved on account of coal issues needs to be assessed for necessary corrective action. Secretariat shall submit such report within 6 months from date of this Order.



26. The Commission also notes that during this proceeding LMEL has filed a submission to state that EON Kharadi, other distribution licensee not related to the Petitioners, have agreed to upward revision in tariff and hence it continued supplying power to EON Kharadi. The Commission notes that EON Kharadi is not party in this proceeding and hence it is not correct to make any comment on such submission. However, the Commission would like to note that as per regulatory provisions, any generation tariff which is not approved by the Commission is not allowed to be passed on to the consumers. The Commission will scrutinise this aspect in upcoming tariff Petition of EON Kharadi.
27. Hence following Order.

### **ORDER**

- 1. Case No. 1 of 2022 is partly allowed.**
- 2. Kreate Energy (India) Pvt. Ltd to pay Rs.1.96 Crore to Petitioners within 15 days from the date of Order as compensation for increased power purchase expenses on account of illegal diversion of contracted power to third party.**
- 3. Petitioners shall adjust such compensation amount in upcoming FAC computation as rebate in power purchase expenses.**

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

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

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

  
**(Abhijit Deshpande)  
Secretary**

  
The seal of the Maharashtra Electricity Regulatory Commission (MERC) is circular with a purple border. Inside the border, the text "MAHARASHTRA ELECTRICITY REGULATORY COMMISSION" is written in a circle. In the center, there is a stylized sun or gear symbol. Below the symbol, the Marathi motto "॥ अदित्य इदम ॥" is written.