CENTRAL ELECTRICITY REGULATORY COMMISSION NEW DELHI

IA No. 67/2024 in Petition No. 276/MP/2024

Coram:

Shri Jishnu Barua, Chairperson Shri Ramesh Babu V., Member Shri Harish Dudani, Member

Date of Order: 30th September, 2024

In the matter of:

Application under Rule 26 read with Rule 47 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2023 seeking urgent interim reliefs.

And

In the matter of

Petition under section 79(1)(f) of the Electricity Act, 2003 seeking quashing of invoices raised by the Respondent No. 1 on the Petitioner for being void, illegal and non-est, and seeking appropriate directions against the Respondent No. 1 to withdraw the invoices uploaded on the PRAAPTI portal and restraining it from issuing or uploading any further invoices on the said portal and from taking any coercive actions in furtherance of such invoices, including by way of seeking regulation of open access under the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022.

And

In the matter of

Maharashtra State Electricity Distribution Company Limited, Prakashgad, Plot No. G-9, Anant Kanekar Marg Bandra (E), Mumbai – 400015

...Applicant/Petitioner

Vs

1. Ratnagiri Gas and Power Private Limited

RGPPL Anjanwel, Taluka: Guhagar

District: Ratnagiri, Maharashtra – 415 634

Registered office at:

NTPC Bhawan, Core - 7 SCOPE Complex, 7, Institutional Area

Lodhi Road – New Delhi – 110 003

2. Grid Controller of India Limited

B-9, First Floor, Qutab Institutional Area, Katwaria Sarai, New Delhi – 110 016



3. PFC Limited, 1st Floor, Urja Nidhi, 1, Barakhamba Lane, Connaught Place New Delhi - 110 001

...Respondents

Parties Present:

Shri Sanjay Sen, Senior Advocate, MSEDCL

Ms. Mandakini Ghosh, Advocate, MSEDCL

Shri Ramanuj Kumar, Advocate, MSEDCL

Shri Vishal Binod, Advocate, MSEDCL

Shri Sagnik Maitra, Advocate, MSEDCL

Shri Siddharth Dharmadikary, Advocate, MSEDCL

Shri Abhikalp Singh, Advocate, MSEDCL

Ms. Swapna Seshadri, Advocate, RGPPL

Ms. Ritu Apurva, Advocate, RGPPL

Shri Kartikeyan Murugan, Advocate, RGPPL

Ms. Sanjeevani Mishra, Advocate, RGPPL

Shri Gajendra Singh, NLDC

Shri Alok Mishra, NLDC

<u>ORDER</u>

Maharashtra State Electricity Distribution Company Limited (in short, 'MSEDCL') had filed Writ Petition (L) No. 24685/2024 before the Hon'ble High Court of Bombay, seeking amongst others, directions for setting aside the invoices raised by the Respondent NTPC against MSEDCL and for restraining the Respondent from issuing any further invoices under the terminated PPA dated 10.4.2007 and from uploading any further invoices on the PRAAPTI portal, seeking payments thereof. The Hon'ble High Court vide order dated 8.8.2024 disposed of the said writ petition, directing as under:

- (a) The Petitioner herein shall file their Petition before the CERC by 14th August 2024 along with an application for stay. These papers and proceedings shall also be served on the Respondents by 14th August, 2024.
- (b) The CERC is requested to take up the stay application of the Petitioner on 20th August, 2024.
- (c) In the interregnum and until 20th August, 2024, it is directed that there shall be no reduction or withdrawal of access for sale and purchase of electricity as provided in Rule 7(c) of the said Rules. It is clarified that this will no affect the reduction. If any, that is already triggered and /or taken place.



- (d) It is clarified that the interim protection granted by us will be subject to the orders passed by the CERC in the proposed stay application to be filed by the Petitioner. The CERC shall decide the Petition and the application for the interim reliefs of the Petitioner without being influenced by anything stated in this order."
- 2. In compliance with the above directions of the Hon'ble High Court, MSEDCL has filed the present Petition seeking the following reliefs(s):
 - (a) Declare that the invoices raised by Respondent No.1 against the Petitioner, as more specifically set out in Annexure-P28 to this petition, as void, non-est, and illegal;
 - (b) Restrain the Respondent No.1 from issuing any further invoices under the terminated PPA dated 10.4.2007 and from uploading any further invoices on the PRAPTI portal, seeking payment thereof;
 - (c) Direct Respondents No. 2 and 3 to restore Petitioner's short-term access and full GNA:
 - (d) Restrain the Respondents from taking any coercive steps against the Petitioner in furtherance of such impermissible, inapplicable, void, non-est, and arbitrary invoices, including by way of regulation of GNA and open access under the framework of the LPS Rules;
 - (e) Pass ad-interim /interim/ex-parte orders(s) in respect of the prayers (b), (c) and (d) hereinabove; and
 - (f) Pass any other further order as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

Interlocutory Application No. 67/2024

- 2. MSEDCL has also filed the interlocutory application (IA) in the above petition, seeking interim reliefs, as under:
 - (a) Direct Respondents No. 2 and 3 to restore Petitioner's short-term access and full GNA and restrain the Respondents from taking any coercive steps against the Petitioner, including by way of regulation of GNA and open access under the framework of the LPS Rules;
 - (b) Pass any other further order as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case

Submissions of the Applicant MSEDCL in the IA

3. Applicant, MSEDCL in the IA has submitted the following:



Irreparable harm will be caused to the Applicant if interim relief is not granted

- (a) The applicant, as the state distribution utility, is responsible for a reliable and adequate supply of power to all its consumers, which include several large power-intensive industries and commercial establishments, as well as crores of residential consumers located across the state.
- (a) Any regulation of GNA or open access of the Petitioner under the LPS Rules in furtherance of the first Respondent's bogus and void invoices will severely impinge on the Petitioner's ability to arrange sufficient quantum of power to meet such peak demand. Any failure to arrange a sufficient quantum of power due to regulation under the LPS Rules will have very severe consequences as Maharashtra is an industry-intensive state, and power supplied by the applicant supports thousands of industries and commercial centers across the State.
- (b) The urgency in the matter arises for the reason that the applicant's entire short-term open access has been curtailed with effect from 17.6.2024 on account of uploading of the said illegal, void, and non-est invoices and 10 percent of GNA (approx. 838.41 MW) has been curtailed with effect from 16.7.2024. This curtailment is affecting the Applicant's ability to procure inexpensive power on a short-term basis from power exchanges, etc., and also affecting its ability to service its consumers, which may lead to potential load shedding.
- (c) On account of the aforementioned regulation of GNA and short-term access, the Applicant is presently prevented from scheduling approximately 402 MUs of power from inter-state generators at economical rates. Such curtailment is also constraining the schedule of power from intra-state as well as inter-state gas-based generators having a high variable cost (up to Rs.12.50/kWh) to meet the state's power demand. Since the imposition of regulation of access, the applicant estimates the financial impact of such restriction is approximately Rs. 103 crores.
- (d) The applicant is also prevented from benefitting from inexpensive power available for short-term procurement through power exchanges, resulting in an estimated loss of Rs. 85 crores on this account. The applicant is a revenue-neutral entity; therefore, any financial loss caused by this account will ultimately be passed on to the consumers, which is not in the public interest.
- (e) In case an additional 10% GNA quantum is regulated on the next trigger date, namely 16.8.2024, then the total GNA curtailment will be approximately 1677 MW, which will further exacerbate the already grave situation faced by the applicant. In such a scenario, the applicant may not have sufficient intra-state generation capacity to compensate for the curtailment of inter-state supply. As such, the applicant may be



compelled to implement load shedding to balance the demand-supply position, thereby placing all its consumers, particularly during the critical Rabbi sowing season.

(f) The applicant has entered into banking arrangements with Tata Power Delhi Distribution Limited (TPDDL), Uttar Pradesh Power Corporation Limited (UPCCL), and Punjab State Power Corporation Ltd (PSPCL). As per the said arrangement, the applicant is obligated to return the banked energy to TPDDL, UPPCL, and PSPCL in the months of July and August 2024. The quantum of banked energy to be supplied back to the aforementioned entities is 111.62 MUs, 184.19 MUs, and 446.40 MUs, respectively. However, due to the regulation of short-term access, the applicant is unable to supply the obligated power to these utilities, resulting in potential defaults under the said banking arrangements and exposing the applicant to severe penal consequences up to Rs. 492 crores.

Prima facie case is in favour of MSEDCL

- (g) The applicant has a strong case on merits as the action of the RGPPL in uploading the void and non-est invoices on the PRAAPTI portal is erroneous, contrary to law, and is causing the applicant and its consumers grave prejudice, necessitating the urgent intervention of this Commission.
- (h) The invoices raised by RGPPL are void, illegal, and non-est and are thoroughly misconceived. The applicant has no liability towards RGPPL from 1.4.2014, as the PPA for the supply of power between them stood terminated from the said date, and as such, any invoices raised by RGPPL or claims made for the period thereafter are without any contractual or legal backing and are hence bad in law.
- (i) RGPPL has not challenged the termination of the PPA before any court or forum to date. Approximately ten years have elapsed since the termination of the PPA, and as such, the termination of the PPA has attained finality. Any potential belated challenge to such termination is bad on merits, and impermissible, being barred by the limitation.

Balance of convenience lies with MSEDCL

- (j) The balance of convenience lies squarely in favour of the applicant. Irreparable harm is being caused to the applicant and its consumers on account of the regulation of its short-term access and GNA, as detailed in the foregoing paragraphs. However, there will be no loss or gain to the account of RGPPL, if the applicant continues to suffer from the regulation of its access.
- (k) RGPPL has preferred to upload its illegal invoices on the PRAAPTI Portal as an extremely belated, self-serving afterthought, having opted not to challenge the termination of the PPA.



- (I) At this stage, RGPPL is abusing the process provided for in the LPS Rules to coerce and arm-twist the applicant into making payments that are otherwise not due to it from the applicant. RGPPL ought not to be permitted to abuse the scheme of LPS Rules, and it is immediately restrained from uploading any invoices on the PRAAPTI Portal, and the already uploaded invoices be stayed forthwith.
- (m) If the curtailment of the MSEDCL's short-term access or GNA due to RGPPL's coercive tactics is not immediately stayed and the status quo ante is not restored, it will severely affect the Applicant's ability to arrange adequate power for its consumers at cost-effective tariffs. This will have a severe and drastic cascading effect on the entire state, particularly on the agricultural consumers as the *Rabbi* sowing season is underway.
- (n) MSEDCL is a revenue-neutral entity and can only pay the charges to the contracted generating companies by collecting the said amount from consumers. The unjust and arbitrary invoices raised by RGPPL without any basis, coupled with the issuance of the letter dated 23.3.2024 of forcing to schedule the power, despite the PPA being terminated, would not only unsettle the applicant's book of accounts but also shall result in tariff shock to consumers and this would be against the settled principles of the Electricity Act, 2003 (hereinafter referred to as 'Act').
- (o) If the applicant is constrained to pay any further amounts to RGPPL under the threat of regulation of its GNA and open access, it will be passed through in tariff to its consumers and ultimately, it is the common consumers of the Petitioner who would be unjustly prejudiced.

Reply of the Respondent, RGPPL in IA

- 4. Respondent RGPPL, in its reply to the IA, has mainly submitted the following:
 - (a) The petition is barred by limitation as well as the application of 'Explanation V' to Section 11 of the Civil Procedure Code, 1908 (in short 'CPC'). There is no prima facie case, let alone a balance of convenience or irretrievable injury necessitating the grant of any interim order to MSEDCL.
 - (b) Under the garb of challenging certain invoices raised by RGPPL towards capacity charges for the capacity declared by it from the generating station to MSEDCL and seeking to recover the same through the PRAAPTI portal, MSEDCL is essentially seeking to raise the same grounds which it had raised as a challenge to an earlier order of the APTEL dated 22.4.2015 before the Hon'ble Supreme Court, by filing Civil Appeal No. 1922/2023.
 - (c)MSEDCL, after having raised the issue in the Civil Appeal and the Review Petition No.1997/2023 filed by it, which were dismissed by the Hon'ble Supreme



Court vide its judgment dated 9.11.2023 and 19.3.2024, respectively, has raised the aspect of unilateral, illegal termination made by it vide its letter dated 8.5.2014 as a defence to the Execution Petition (EP No. 12/2023). After failing to get an order in the final hearing before APTEL, MSEDCL has filed the said Writ Petition before the Hon'ble High Court of Bombay seeking a stay of the PRAAPTI proceedings.

- (d) The total amount to be recovered by RGPPL from MSEDCL is in excess of Rs. 7000 crores. RGPPL has exercised its legal remedy by filing the Execution Petition before the APTEL. The present regulation of power to MSEDCL is only on behalf of the following invoices uploaded on the PRAAPTI portal:
 - (i) Invoice dated 4.3.2024 for Rs. 54,29,64,342 for a regular monthly bill of February 2024 and LPS bill of Rs. 44,01,24,696 for the month of February 2024 with default trigger date of 16.6.2024
 - (ii) Invoice dated 5.4.2024 of Rs. 80,35,91,304 for regular monthly bill of March 2024 and LPS bill of Rs. 48,10,95,721 for the month of March 2024 with default trigger date of 20.6.2024.
 - (iii) Invoice dated 4.5.2024 of Rs. 81,28,03,409 for a regular monthly bill of March 2024 with a default trigger date of 19.7.2024.
- (e) With respect to the invoice uploaded for outstanding dues, including monthly capacity charges and LPS from July 2013 onwards to January 2024, MSEDCL has temporarily closed the same by paying Rs. 500 crores as interim. MSEDCL has also frustrated every other avenue of settlement attempted by RGPPL, including under the aegis of the Ministry of Power in its meetings held on 15.3.2024 and 4.4.2024. In such circumstances, MSEDCL is not entitled to any interim orders, and it must be directed to honour the invoices to avoid regulation on the PRAAPTI portal.

The present petition is barred by limitation

- (f) There is a clear bar by application of the principles of limitation on MSEDCL in maintaining the present Petition before this Commission seeking adjudication on the purported termination of the PPA dated 10.4.2007 executed by the parties. The cause of action, if any, arose on 22.4.2014 when RGPPL repudiated the unilateral termination of PPA that was proposed by MSEDCL. As the cause of action arose on 22.4.2014, a petition seeking declaration that the termination of PPA is correct could have been filed by MSEDCL latest 21.4.2017. (Reliance placed on the judgment of the Hon'ble Supreme Court in APPCC and Ors. Vs M/s Lanco Kondapalli Power Ltd. & Ors. (2016) 3SCC 468).
- (g) MSEDCL did not even bring up the aspect of termination as an alternative argument in its appeal, which was then pending before the APTEL by which it had



challenged the Commission's order dated 23.7.2014. MSEDCL, after losing the appeal, did bring this aspect when it filed its civil appeal before the Hon'ble Supreme Court which was dismissed by the Hon'ble Court vide its judgment dated 9.11.2023. MSEDCL had filed a review petition on the specific ground that the issue of termination had not been dealt with by the Hon'ble Supreme Court, which amounted to an error apparent face on the record. This was also rejected by the Hon'ble Court by the order dated 19.3.2024. In the circumstances, the issue of termination raised by MSEDCL ignoring the aforesaid orders of the Hon'ble Supreme Court is unfair and unjust.

(h) After the purported termination by MSEDCL (with effect from 1.4.2014), the Commission issued tariff orders in the tariff petitions filed by RGPPL, wherein MSEDCL has been the main Respondent. The Commission issued a tariff Order dated 21.3.2017 for the period 2014-19, an Order dated 8.3.2021 for truing up of tariff for the period 2014-19, and an Order dated 25.10.2021 for determination of tariff of the generating station for the period 2019-24. However, MSEDCL, in these proceedings, never even raised the issue of termination of the PPA and has accepted these tariff orders of the Commission.

<u>The termination of the PPA is barred by the application of Explanation V to Section 11 of the CPC</u>

- (i) MSEDCL cannot be permitted to take an argument that there is no discussion or finding in the judgment of the Hon'ble Supreme Court on the aspect of termination in order to contend that the present petition is maintainable. Such a contention could be barred by the principles of Explanation V to Section 11 of the CPC. [Reliance placed on the judgment of the Hon'ble High Court of Calcutta in Apurba Krishna Roy v. Shyama Ch. Parmanik and Ors. (AIR 1920 Cal 253].
- (j) In any event, the purported termination of the PPA by a communication dated 8.5.2014 was also on the basis that RGPPL is misinterpreting articles 4.9 and 5.3 of the PPA. This question has been settled by the Hon'ble Supreme Court in favour of RGPPL. The Hon'ble Court has found that the intention of both RGPPL and MSEDCL in entering into the PPA was to provide for both natural gas and R-LNG as primary fuel and make payment of capacity charges as and when the availability is declared by RGPPL on R-LNG without obtaining the permission from MSEDCL. If the interpretation of the PPA has been held in favour of RGPPL, a communication purporting to terminate the PPA on an incorrect interpretation by MSEDCL cannot be sustained under any circumstances.
- (k) RGPPL has promptly repudiated the termination and continued to do so by several of its communications over the years. RGPPL had a decree in its favour both from this Commission and from APTEL requiring MSEDCL to make payment



of the capacity charges and also approving its interpretation of the PPA. The bills raised by RGPPL are strictly in terms of this interpretation which has also been approved by the Hon'ble Supreme Court. MSEDCL cannot sleep over its rights and now seeks to belatedly challenge and seek a declaration that its termination was correct.

Irreparable harm will be caused to RGPPL if interim relief is granted

- (I) The only ground for urgent interim relief is the so-called consumer interest and the ability of MSEDCL to arrange adequate power for such consumers. If MSEDCL was really concerned about consumer interest, it would have honoured the bills on the PRAAPTI portal to continue with the full open access instead of raising the same before the Hon'ble Supreme Court, APTEL, and the High Court of Bombay to get some interim order.
- (m) The unjustness and arbitrariness on the part of MSEDCL are also clear from the facts that despite the order dated 8.8.2024 of the Hon'ble High Court of Bombay specifically giving limited protection to MSEDCL and not even reversing the earlier regulation of short-term open access and 10% long term open access on 10.8.2024, MSEDCL has attempted to close all invoices of RGPPL on PRAAPTI portal by relying on this order.
- (n) In lieu of the reconciliation process, MSEDCL kept on writing letters to RGPPL requesting to withdraw the bills from the PRAAPTI portal. RGPPL, in response, sought the payment plan from MSEDCL for the entire amount, but MSEDCL denied giving the same, stating that the plan would be submitted after the reconciliation of the amounts. Lastly, when the Ministry of Power directed MSEDCL to pay the amount to RGPPL, MSEDCL frustrated the arrangement by not adhering to the same.

Prima facie case is in favour of RGPPL

(o) A perusal of the application, as well as the petition filed by MSEDCL, shows that it is seeking to reargue the civil appeal filed before the Hon'ble Supreme Court challenging the judgment of APTEL dated 22.4.2015. There is no provision in the PPA enabling either of the parties to unilaterally terminate the PPA. As stated, the Hon'ble Supreme Court had dismissed the civil appeal, confirming the judgment of the APTEL. The Review Petition filed by MSEDCL was also dismissed by order dated 19.3.2024. In the circumstances, for MSEDCL to once again bring the very same issue of termination in the present petition shall amount to re-arguing the grounds raised earlier. It is well settled principle of law that if a ground raised before the appellate court does not find mention in the judgment, then the same ground shall be deemed to have been rejected.



- (p) It cannot be that MSEDCL can claim a unilateral termination of the PPA by simply writing the letter without bringing the aspect of termination before APTEL, though the appeal was pending at the stage. MSEDCL has also not sought any determination on its alleged termination but has lost its civil appeal and the review petition before the Hon'ble Supreme Court, where the ground of termination was specifically taken, and the very same ground of termination, which was denied, is taken as a defence in the present petition.
- (q) MSEDCL has clearly sought to reargue its civil appeal, by asking this Commission to decide an issue, that it had lost before the Hon'ble Supreme Court. Even otherwise, the ground of termination is without merit for the reason that (i) the PPA dated 10.4.2007 is valid for a period of 25 years from COD, (ii) there is no provision in the PPA providing for early termination, and both MSSEDCL and RGPPL are bound to perform the PPA till 18.5.2034. (iii) The purported termination attempted by MSEDCL by letter dated 8.5.2014 was immediately repudiated by RGPPL vide letter dated 22.5.2014 referring to Article 13 of the PPA, which stated that the agreement cannot be unilaterally terminated by MSEDCL. (iv) position of RGPPL with regard to unilateral termination by MSEDCL has been conveyed in several letters, including letters dated 22.5.2014, 3.6.2014. 13.4.2016, 21.6.2019, 10.5.2021, 24.11.2021 and 29.10.2022. (v) W.e.f. 1.4.2014, RGPPL has been faithfully declaring the availability as per Article 4.1.2 of the PPA, and all the schedule clearing and energy accounting is being maintained by WRLDC. (vi) As per Section 28 of the Electricity Act, 2003 as well as the PPA, it is the WRLDC that has to accept the declaration of availability by RGPPL. It prepares the regional energy accounts, which reflect the availability declared by all generation stations in the western region, including RGPPL. (vii) WRPC has also been accepting the energy accounts prepared by WRLDC, and the declaration of availability has been and continues to be reflected in the regional energy accounts prepared by WRLDC.
- (r) RGPPL was not required to obtain any declaration on the purported termination, since such termination stood repudiated immediately. Also, in all the tariff petitions, MSEDCL was the main Respondent, which never brought the issue of termination during the pendency of these petitions. The invoices raised for capacity charges (including LPS) are in terms of the Commission's orders and applicable tariff regulations.
- (s) MSEDCL wrote several letters to the Ministry of Power to deallocate its allocation from RGPPL. However, no such deallocation has been done to date. In the absence of the same, the power remains allocated to RGPPL, which is substantiated by the allocation orders issued by WRPC from time to time.



- (t) When power was allocated to the Railways from RGPPL for the period from November 2015 to March 2022, it was out of the allocation to MSEDCL, which was restored to MSEDCL after March 2022. It is MSEDCL that was required to obtain a declaration that a PPA has been validly terminated. The declaration of capacity by RGPPL for supply to MSEDCL is made on a daily basis to the WRLDC. The declaration of availability is accepted by the RLDC only in terms of the contract entered into between the parties.
- (u) In terms of Article 4.1.2 of the PPA, the scheduling and metering energy accounting is maintained by WRPC. It is in terms of the above energy accounts prepared by WRPC that the capacity charges are claimed for the declared availability. The availability declared by RGPPL has been and continues to be reflected in the REA prepared by WRPC.
- (v) MSEDCL is seeking to take advantage of its own wrong by engaging in a unilateral termination and also by claiming that it is for RGPPL to go and challenge the termination, even if indirectly done and reiterating the issue in the present petition, after having been denied the relief prayed under the very same grounds before the Hon'ble Supreme Court.

Balance of convenience lies with RGPPL

- (w) RGPPL, having made an upfront investment in establishing, operating and maintaining the generating station, the capital cost incurred needs to be serviced during the lifetime of the generating stations through the payment of annual fixed charges. Such annual fixed charges are determined with reference to the specific tariff elements as provided under the applicable tariff regulations.
- (x) MSEDCL has not paid the fixed charges during the past 11 years, and for this reason, RGPPL has not been able to adequately service its plant, due to which the condition of the plant has deteriorated. Due to the non-payment of the capacity charges, RGPPL was forced to put all its units under dry preservation from September 2014 to November 2015. RGPPL was also not able to overhaul Block-lof the station on time and was also not able to declare availability, leading to loss of capacity charges. Due to continuous losses, RGPPL was only able to meet its preservation expenses. Due to losses, the lenders approached the GOI resulting in the demerger of the LNG plant, which was envisaged as an integral part of the power block. Also, the credit rating of RGPPL has worsened due to continuous losses, and it had to take short-term loans for working capital at high interest rates as compared to the normal lending rate, as major financial institutions are shy of extending long-term loans because of poor credit ratings.
- (y)RGPPL has been faithfully declaring its availability month on month to WRLDC



and raising monthly invoices towards capacity charges to MSEDCL in accordance with the respective tariff regulations read with the tariff orders. By terming the invoices as illegal, MSEDCL is indirectly trying to challenge the due process and the LPS Rules formulated as mechanisms to enable generators to recover their legitimate dues from the beneficiaries.

(z) If MSEDCL is so concerned about the tariff shocks to the consumers of Maharashtra, then it should have at least paid the principal amount so that the interest is not levied on it.

Hearing dated 20.8.2024

- 7. During the hearing of the Petition along with the IA on 20.8.2024, the learned senior counsel for MSEDCL made a detailed oral submission reiterating the submissions made in the IA as above. The learned counsel for RGPPL, while opposing the interim relief sought by MSEDCL on the grounds mentioned above, submitted that no coercive action be taken by RGPPL and the interim relief granted by the Hon'ble High Court of Bombay, vide order dated 8.8.2024, shall remain applicable to MSEDCL till final disposal of the IA No. 67/2024. The Commission, after directing the parties to file their short note of written submissions, reserved its order in the IA.
- 8. In response, MSEDCL and RGPPL have filed their written submissions on 30.8.2024 and 27.8.2024, respectively.

Written submissions of MSEDCL in the IA

- 9. In addition to the submissions in the IA, MSEDCL, in its written submissions, has mainly stated as under:
 - (a) After termination of the PPA, no power has been supplied to MSEDCL, and, as such, RGPPL was selling power to Indian Railways for the period 26.11.2015 to 31.3.2022 in order to supply power to Indian Railways. RGPPL has executed a separate PPA with Indian Railways, which was facilitated by the PMO and the Government of Maharashtra for which several financial benefits in the forms of exemptions/ waivers (VAT and Sales Tax) were given. Additionally, transmission charges and losses for using the state transmission system were also waived.



(b) Admittedly, after the termination of the PPA, although invoices were raised from time to time, RGPPL did not initiate any proceedings for the recovery of payment against such invoices until it was supplying power to the Indian Railways and benefitting from the concessions extended to it. Without initiating any proceedings before any competent forum challenge in the termination of the PPA, RGPPL took shelter under the LPS Rules (notified on 3.6.2022) to wrongfully recover payment towards invoices raised from the year 2013-14 onwards.

Orders of the Hon'ble Supreme Court in Civil Appeal and Review Petition do not operate as constructive res judicata qua the present proceedings

- (c) The earlier proceedings instituted by RGPPL (Petition No. 166/MP/2012) before this Commission were in relation to the interpretation of the terms of the PPA and were much before the termination of the PPA. This Petition was disposed of by order dated 30.7.2013, which was prior to the termination of the PPA. The Appellate proceedings before APTEL were a continuation of the original petition and, as such, were limited to the issues set out in Para 8 of the judgment dated 22.4.2015 of APTEL.
- (d) At the time when the original proceedings and the appellate proceedings were instituted, RGPPL had a valid long-term gas supply agreement dated 10.4.2007, which expired subsequently on 31.3.2014. the judgment and order of the APTEL clearly related to the period when PPA was in existence and electricity was generated on the basis of the gas supply agreement, which expired on 31.3.2014.
- (e) The jurisdiction of the Hon'ble Supreme Court in the second appeal is fairly narrow and limited to questions of law, and as such, the Hon'ble Court was not concerned with the subsequent facts that have arisen. The issue was limited to interpretation of clauses of the PPA, particularly Clause 4.3 and the issue of termination of PPA was not the subject matter of the proceedings before the Hon'ble Supreme Court.
- (f) Explanation V to Section 11 of the CPC applies only in respect of the relief claimed and not in respect of the facts urged or grounds taken. This has no application to the present case, as contended. Further, the question of constructive res judicata cannot apply when, in a certain appeal, a question of law is to be decided, which is not dependent on a subsequent development or event that has taken place between the parties.
- (g) The review petition and/or the order dismissing the same on the ground that there is no error apparent on the face of the record cannot expand the scope of the original civil appeal so as to enable the invocation of the doctrine of constructive res judicata.



The termination of PPA has attained finality and enforcement of PPA based on LPS Rules without a declaratory relief that the termination of PPA is bad in law.

- (h) After the expiry of the GSA on 31.3.2014, no further long-term GSA was executed by RGPPL. This being a material breach of the PPA, MSEDCL terminated the PPA vide a letter dated 8.5.2014. While RGPPL disputed the termination, no steps were taken to have the said letter set aside and/or declare that the action of MSEDCL to terminate the PPA was wrongful. On the contrary, RGPPL executed a PPA with Railways for the supply of 540 MW of power for a period from 1.4.2017 to 31.3.2022. this conduct of executing another PPA has a bearing, as there cannot be two PPAs for the same capacity and is an acceptance of the event of termination by RGPPL.
- (i) RGPPL has, in no manner, challenged the termination of the PPA before any competent court to date, and the termination has, therefore, attained finality. As per settled law, the specific performance of a terminated agreement cannot be sought without seeking declaratory relief against such termination. (Reliance placed on the judgment of the Hon'ble Supreme Court in I.S. Sikander v K. Subramani & Ors. (2013) 15 SCC 27).
- (j) The limitation began to run qua RGPPL, upon issuance of MSEDCL's termination letter, as it was RGPPL which can be said to be purportedly aggrieved by such termination.

IAs filed by the Applicant before APTEL in the execution proceedings

- (k) The execution proceeding is limited to the execution of an order which relates to the period prior to the termination of the PPA. In the present case, MSECL is challenging the invoices that are sought to be enforced under the LPS Rules, which were issued after the termination of the PPA. Admittedly, a substantial number of invoices relate to the period prior to the LPS Rules, and RGPPL did not take any steps to classify the alleged demands as arrears and/or seek remedies in terms of Rules 5 of the LPS Rules. There is no explanation as to how RGPPL could enter into the parallel PPA with the Railways when it alleges that the present PPA was subsisting.
- (I) RGPPL is demanding fixed charges for declaring availability only to the tune of approximately 13% on an average from 2014-15 to 2023-24. It is a clear case of 'rent-seeking', which will cause an enormous unjustified burden on the consumers of Maharashtra, who have not benefitted at all from RGPPL. No supply has been made during this period for which RGPPL is seeking the recovery of fixed charges.

Short note of submissions of RGPPL

10. RGPPL, in addition to its reply submissions in the IA, has, in the short note of



submissions, mainly submitted the following:

- (a) No prima facie case has been made out by MSEDCL for the grant of interim relief. MSEDCL is essentially seeking to avoid the payment of these invoices on the basis that it has terminated the PPA vide letter dated 8.5.2014. Such termination was repudiated by RGPPL vide letter dated 22.5.2014. The cause of action to get the declaration that the termination is correct, if any, arising on MSEDCL, who should have fled the petition within three years of repudiation, i.e, latest by 21.4.2017.
- (b)MSEDCL, in its written submissions is seeking to extract selectively from the question of law and issues framed in the Civil Appeal No. 1922/2023. However, the fact remains that MSEDCL chose to raise the issue of termination in the Hon'ble Supreme Court proceedings and got a rejection. Therefore, Explanation V to Section 11 of CPC would be clearly applicable.
- (c) The balance of convenience is also against MSEDCL since (i) MSEDCL has not paid the bills for the capacity charges raised by RGPPL from 2013-14 onwards, (ii) The credit rating of RGPPL has worsened due to the continuous losses being faced by it (iii) MSEDCL has frustrated every effort of settlement which RGPPL has undertaken including under the aegis of MOP and the PMO (iv) RGPPL has succeeded in its claim towards the capacity charges on the interpretation of Article 4.3 and 5.9 of the PPA, right till the Hon'ble Supreme Court (v) the bills raised by RGPPL are strictly as per the various tariff orders of this Commission, and (vi) MSEDCL cannot start a belated round of litigation on the issue of termination, which it has for reasons best known to it raised and lost before the Hon'ble Supreme Court as well as a defence in the execution proceedings filed by RGPPL.
- (d)The execution proceedings have thereafter been heard on various dates, and IA No. 1068/2024 remains pending before the APTEL. There is no basis for MSEDCL to contend that its IA has now become infructuous. No orders have ben passed by APTEL staying the PRAPTI portal proceedings, despite repeated requests by the senior counsel who appeared for MSEDCL.
- (e)The short-term open access of MSEDCL got regulated from 17.6.2024 and 10% of the long-term access got curtailed with effect from 16.7.2024. The final hearing before APTEL was held on 30.7.2024, and even on that date, an attempt was made to seek an order for no coercive action to be taken.
- (f) The consumer interest would have been protected if MSEDCL had honoured the bills getting triggered on the PRAAPTI portal. As on date, MSEDCL has only to pay Rs 471 crores to avoid any curtailment by 22.8.2024, and the next instalment would become due near about 16.9.2024. MSEDCL has frustrated the lawful decree



obtained by RGPPL from three courts in its favour and, therefore, is not entitled to any interim protection. Further, and without prejudice, even in the present petition, MSEDCL has admitted (in para 66) that for the year 2013-14, it has to pay Rs 1400 crores to RGPPL.

Additional contentions raised by MSEDCL in its written submissions

- (g) The reliance placed by MSEDCL in the minutes dated 30.9.2015 and notifications dated 26.10.2015 and 16.9.2017 contending that RGPPL proceeded to execute another PPA with the Railways for supply of the same capacity for a period from 1.4.2017 to 31.3.2022 is misleading and an attempt to confuse the issue. The PPA was executed with the Indian Railways to the extent of 540 MW for the said period and this was a temporary allocation out of the power allocated to MSEDCL from RGPPL. The allocation was done after the PMO meeting dated 4.3.2017 in which the Principal Secretary (Energy) from the Government of Maharashtra also agreed. It is incorrect that there were two PPAs signed for the same quantum of power.
- (h) The minutes dated 30.9.2015 held at the Hon'ble Prime Minister's office were in regard to the scheme which was floated on 27.3.2015 by the Central Government, MOP, to revive Gas plants across the country by enabling sale therefrom to third parties. Certain findings under the PSDF support were given by the MOP to stranded gas-based plants. RGPPL became stranded due to the non-payment of fixed costs by MSEDCL. RGPL was one of the bid winners and supplied power to Indian Railways to the extent of 300-620 MW for the period 26.11.2015 to 31.3.2017, and after PSDF, RGPPL supplied power to Indian Railways to the extent of 540 MW for the period 1.4.2017 to 31.3.2022.
- (i) There is no double claim with regard to the capacity charges by RGPL against MSEDCL for the power temporarily reallocated to Railways. In fact, by agreeing to this arrangement, RGPPL has mitigated the matter and reduced the liability of MSEDCL towards the fixed charges by an amount of Rs 2792 crores. This also resulted in other monetary benefits to MSEDCL.
- (j) The notifications dated 26.10.2015, 16.9.2017 as well as the letters dated 16.12.2016 and 22.12.2016 relied upon by MSEDCL related to the proposal on waiver of transmission charges, the said waivers being claimed were ultimately not extended to RGPPL.
- (k) The submission of MSEDCL that RGPPL is using extrajudicial means to receive its dues and the comparison of the capacity charges as 'rent-seeking' is preposterous since the PRAAPTI portal operates under the Electricity (Late Payment Surcharge & other related matters) Rules, 2022 framed by the GOI under



section 176 of the Act. Also, the judgment of the Hon'ble Delhi High Court in Rajasthan Breweries Ltd v Stroh Brewery Company (AIR 2000 Delhi 450) relied upon by MSEDCL does not lay down any conclusive principle that a private commercial contract can be terminated at any point in time without assigning any reason.

(I) The ratio of the judgment of the Hon'ble Supreme Court in [I.S.Sikandar v K.Subramani & ors (2013) 15 SCC 27] has no application since it is MSEDCL that is the Petitioner before this Commission and is seeking a time-barred declaration of having correctly terminated the PPA. MSEDCL should be directed to pay the undisputed amount of Rs 1400 crores (for 2013-14) and Rs. 471 crores which has become due till 22.8.2024 immediately, subject to the final decision of this Commission.

Analysis and Decision

- 11. As laid down by the Hon'ble Supreme Court in Kishoresinh Ratansinh Jadeja v Maruti Corporation (2009) 11 SCC 229; Best Sellers Retail (i) Private Ltd v Aditya Birla Nuvo Ltd (2012) 6 SCC 792; State of Mizoram v Pooja Fortune Private Ltd (2019) SCC OnLine 1741, the grant or refusal of interlocutory relief is covered by three established principles namely (i) whether the applicant (MSEDCL) has made out a prima facie case (2) whether the balance of convenience is in its favour and (3) whether the applicant (MSEDCL) would suffer irreparable injury. With the first condition as a sine qua non, at least two conditions should be satisfied by the applicant conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them to the grant of interim relief in its favour.
- 12. A prima facie case does not mean a case proved to the hilt, but a case that can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case has been made out or not, the relevant consideration is whether, on the evidence led, it was possible to arrive at the

conclusion in question, and not whether that was the only conclusion that could be arrived at on that evidence. The Prima facie case means that the assertions on these aspects are bonafide [Nirmala J Jhala v State of Gujarat (2013) 4 SCC 301]. The Prima facie case is a substantial question raised, bonafide, which needs investigation and a decision on merits. [Tata Power Company Ltd v MERC [2023 SCC Online APTEL 23]

- The main thrust of the argument of MSEDCL is that the PPA dated 10.4.2007 was 13. terminated by it vide letter dated 8.5.2014 (with effect from 1.4.2014), and as a consequence thereof, it has no liability towards RGPPL from 1.4.2014 and therefore, the invoices raised by RGPPL on the PRAAPTI portal is without any contractual or legal backing and hence are bad in law. MSEDCL has prayed that RGPPL is liable to be restrained from issuing or uploading any further invoices on the said portal and also from taking any coercive action in terms of the LPS Rules in furtherance of such invoices. It has also stated that RGPPL has not challenged the termination of the PPA before any Court or forum to date, and as such, the termination of the PPA has attained finality, and any potential belated challenge to such termination would not only be bad on merits but is impermissible for being barred by the law of limitation. MSEDCL, while pointing out that it has a strong case on merits and is likely to succeed in the present Petition, has submitted that the action of RGPPL in uploading the invoices on the PRAAPTI portal is erroneous and is causing MSEDCL and its consumers grave prejudice.
- 14. Per contra, RGPPL has argued that MSEDCL is not entitled to terminate the PPA unilaterally and that it had, vide letters dated 22.5.2014 and 3.6.2014, repudiated the

purported termination by MSEDCL, with a request to clear its outstanding dues. RGPPL has contended that the cause of action having arisen on 22.5.2014, a petition seeking declaration that the termination of PPA is correct, could have been filed by MSEDCL at the latest by 21.4.2017. Having not done so, there is a clear bar on MSEDCL, by application of the principles of limitation, to maintain the present Petition. RGPPL has further argued that though MSEDCL had not raised the aspect of termination in its appeal (Appeal No.261/2013) filed before APTEL challenging the Commission's order dated 30.7.2013 in Petition No.166/MP/2012, which was subsequently dismissed vide judgment dated 22.4.2015, MSEDCL had raised this aspect of termination in the Civil Appeal (C.A.No.1922/2023), which was also dismissed by the Hon'ble Supreme Court on 9.11.2023. RGPPL has further stated that on a review filed by MSEDCL against this order in R.P.(C) No.1997/2023, the issue of non-consideration of the aspect of termination by the Hon'ble Supreme Court was raised by MSEDCL, which was also rejected by the Hon'ble Court vide its order dated 19.3.2024. Accordingly, RGPPL has contended that the petition is barred by the principles of limitation and the principles of Explanation V to Section 11 of the CPC-constructive res judicata. While pointing out that the bills raised by it are strictly in terms of the interpretation of the PPA, which has also been approved by the Hon'ble Supreme Court, RGPPL has argued that consumer interest would have been protected if MSECDL had honoured the bills getting triggered on the PRAPTI portal. RGPPL has therefore, contended that there is no prima facie case necessitating the grant of any interim order to MSEDCL.

15. In its rebuttal, MSEDCL has submitted that the judgment of the APTEL dated 22.4.2015, related to the period when the PPA was in existence and electricity was

being generated on the basis of the GSA, which agreement came to an end only on 31.3.2014. While pointing out that the issue before the Hon'ble Supreme Court in the Civil Appeal No.1922/2023 (which was disposed of by order dated 9.11.2023 confirming the APTEL judgment dated 22.4.2015) was limited to the interpretation of clauses of the PPA, more particularly clause 4.3, MSEDCL has contended that the issue of termination of the PPA was not the subject matter of the proceedings before the Hon'ble Supreme Court and there is no finding to that effect either. Accordingly, MSEDCL has argued that since no relief whatsoever was sought by it in relation to the termination of the PPA, the explanation V to section 11 of the CPC has no application to the present case. MSEDCL has further submitted that RGPPL, having opted not to challenge the said termination to date despite expressing its objections thereto, has rendered the termination final, and any potential challenge thereto is barred by limitation. MSEDCL has also argued that RGPPL ought not be permitted to effectively enforce the terminated PPA, either by resorting to the LPS Rules or otherwise, as the PPA has been terminated and RGPPL has failed to challenge such termination.

16. We have examined the rival contentions of the parties and the documents available on record. In Petition No.166/MP/2012 filed by RGPPL, seeking, amongst others, the resolution of issues arising out of a non-availability of domestic gas of the required quantum and the reservation of beneficiaries to allow RGPPL to enter into contracts for available alternate fuel (RLNG), the Commission vide order dated 30.7.2023 held that any declaration of capacity by RGPPL based on RLNG as the primary fuel, qualifies for the computation of availability of the generating station for recover of the fixed charges and accordingly, the fixed charges recovery to be made by

RGPPL based on the availability after accounting for declaration of capacity on RLNG. MSEDCL challenged the said order before APTEL in Appeal No. 261/2013, wherein APTEL, vide its judgment dated 22.4.2015 while upholding the Commission's order dated 30.7.2013, observed that MSEDCL was under an obligation to pay the capacity charges to RGPPL, even if MSEDCL does not give consent to GSA/GTA. Be that as it may, MSEDCL, in the interregnum, vide letter dated 8.4.2014, terminated the PPA with effect from 1.4.2014, and the same was repudiated by RGPPL vide its letters dated 22.5.2014 and 3.6.2014 stating there was no such provision in the PPA for a unilateral termination. Pursuant to such repudiation, MSEDCL has not approached any forum seeking a declaration that its termination of the PPA was correct. However, we note that MSEDCL, while challenging the APTEL judgment dated 22.4.2015 before the Hon'ble Supreme Court in Civil Appeal 1922/2023, had raised the issue of termination of the PPA and the monthly capacity charges bills being raised by RGPPL (in grounds MM and NN respectively). This Civil Appeal was dismissed by the Hon'ble Court on 9.11.2023, and against this order, MSEDCL filed a Review Petition (RP (C) No.1997/2023) on specific grounds (grounds I and J) stating that the issue of termination of the PPA raised by it, had not been dealt with by the Hon'ble Supreme Court, which was an error apparent on the face of the order dated 9.11.2023. This review petition was also rejected by the Hon'ble Supreme Court vide its order dated 19.3.2024. While MSEDCL has contended that RGPPL, having opted not to challenge the said termination, has rendered the termination of the PPA final and that any potential challenge thereto is barred by limitation, RGPPL has argued that the present petition is barred by limitation and also the principles of Explanation V to section 11 of



the CPC, since MSDCL should have filed the petition within three years of the date of repudiation and the issue of termination of the PPA raised by MSEDCL had been rejected by the Hon'ble Supreme Court. In this background, the question that necessitates examination, not at the interlocutory stage of the proceedings, but when the main petition is finally heard, is whether the issue of termination of the PPA dated 10.4.2007 had attained finality and /or whether the principles of the law of limitation and constructive res judicata, would be applicable in the present case. Since the aforesaid issues are to be adjudicated during the proceedings in the main petition, we proceed on the basis that there exists a prima facie case for consideration of the grant of interim reliefs in the present case. With the first test of prima facie case being a sine qua non, one of the other two tests of the balance of convenience or irreparable injury must be satisfied for the grant of interim relief, which is examined below:

Balance of convenience

17. The basic principle for the grant of an interlocutory order is to assess the rights and needs of the applicant as against that of the Respondent, and it is a duty incumbent on the law courts to determine where the balance lies [Colgate Palmolive (I) Ltd v Hindustan Lever Ltd [1999) 7 SCC 1]. MSEDCL, while stating that the balance of convenience lies squarely in its favour, has submitted that irreparable harm is being caused to MSEDCL and its consumers on account of the regulation of its short-term access and GNA. It has also been submitted that RGPPL is abusing the process provided for in the LPS Rules to coerce MSEDCL to make payments that are otherwise not due to it from MSEDCL. It has also submitted that if the curtailment of short-term access or GNA due to RGPPL's coercive tactics is not immediately stayed and the

status quo ante is not restored by this Commission, it will severely affect MSEDCLs ability to arrange adequate power for its consumers at cost-effective tariffs and such a scenario will have a severe and drastic cascading effect on the entire state, particularly on the agricultural consumers. MSEDCL has added that the unjust and arbitrary invoices raised by RGPPL without any basis, coupled with the issuance of a letter dated 23.3.2024 forcing to schedule power despite the PPA being terminated, would not only unsettle MSEDCL's book of accounts but also shall result in tariff shock to consumers and this would be against the settled principles of the Electricity Act, 2003.

Per contra, RGPPL has submitted that having made an upfront investment in establishing, operating, and maintaining the generating station, the capital cost needs to be serviced during the lifetime of the generating station through the payment of the annual fixed charges, which are determined with reference to the specific tariff elements as provided in the applicable Tariff Regulations. It has also contended that since MSEDCL has not paid the fixed charges in the past 11 years, it has not been able to adequately service its plants due to which the condition of the plant has deteriorated. Also, the credit rating of RGPPL has worsened due to continuous losses, and RGPPL has to take short-term loans for working capital at higher interest rates compared to the normal lending rate, as major financial institutions are shy of extending long-term loans because of poor credit rating. RGPPL has pointed out that as the issue of payment of capacity charges has attained finality, it cannot be the case of MSEDCL that RGPPL will not lose anything if the said amount is not paid, even after getting favourable orders from three forums. RGPPL has further submitted that it has been faithfully declaring its availability month on month to WRLDC and raising monthly invoices towards capacity charges to MSEDCL in accordance with the tariff orders read with the tariff regulations. RGPPL, while pointing out that the bills raised are strictly in terms of the interpretation approved by the Hon'ble Supreme Court, has stated that if MSEDCL was concerned about the tariff shock to the consumers of Maharashtra, then it should have at least paid the principal amount so that interest is not levied on it. In its rebuttal, MSEDCL, while pointing out that a substantial number of invoices relate to the period prior to the LPS Rules, has mainly submitted that RGPPL did not take any steps to classify the alleged demands as arrears and/or seek remedies in terms of Rule 5 of the LPS Rules. This, according to MSEDCL, is because during that period, RGPPL was supplying power to the Railways and, as such, was taking benefit of the waivers and incentives to enable such supply. MSEDCL has argued that there is no explanation as to (i) how RGPPL could enter into a parallel PPA with Railways when they were alleging that the present PPA is subsisting and (ii) how RGPPL has not committed a material breach of the PPA when the long-term Gas Supply & Transportation Agreement as envisaged under the PPA came to an end on 31.3.2014. In response, RGPPL, while stating that it became a stranded Gas power plant due to nonpayment of fixed cost by MSEDCL, submitted that it was one of the bid winners and supplied power to Railways to the extent of 300-620 MW for the period 26.11.2015 to 31.3.2017 and after funding under the PSDF, RGPPL has supplied power to Railways to the extent of 540 MW for the period 1.4.2017 to 31.3.2022. RGPPL, while pointing out that it was a temporary allocation out of the power allocated to MSEDCL from RGPPL, has clarified that there is no double claim with regard to the capacity charges by RGPPL against MSEDCL for such power and that RGPPL had mitigated the matter and reduced the liability of MSEDL towards the



fixed charges by an amount of Rs 2792 crores, which also resulted in monetary benefits to MSEDCL. RGPPL has added that MSEDCL has frustrated the lawful decree obtained by RGPL from three courts in its favour, and it is, therefore, not entitled to any interim protection.

- 19. We have examined the above submissions of the parties. In Petition No.166/MP/ 2012 filed by RGPPL, this Commission vide order dated 30.7.2013, disposed of the same, holding as under:
 - '25. MSEDCL in its discretion may not schedule the capacity declared on RLNG since it has implications on the variable charges. However, it cannot disown its liability to pay the fixed charges when RGPPL declares capacity based on RLNG as the primary fuel in accordance with Article 4.3 of the PPA.
 - 26. In the light of the above discussions, any declaration of capacity by RGPPL based on RLNG as the primary fuel qualifies for the computation of availability of the generating station for recovery of the fixed charges and accordingly the fixed charge recovery be made by the petitioner based on availability after accounting for declaration of capacity on RLNG. 27. In view of the above finding, we do not consider it necessary to get into the issues of relaxation of NAPAF already approved by the Commission or the admissibility of invoking Force Majeure clause by RGPPL."
- 20. On an appeal (Appeal No.261/2013) filed by MSEDCL against the above-said order, APTEL vide its judgment dated 22.4.2015 had dismissed the same, confirming the Commission's order holding that MSEDCL is required to pay the capacity charges to RGPPL, even if MSEDCL does not give consent to the GSA/GTA. The relevant portion of the order is extracted below:
 - "16. Thus both the issues are decided against the appellant and the instant appeal is liable to be dismissed. We clearly hold that the appellant distribution licensee is required to pay capacity charges to the respondent No.2, power generating company even if the appellant does not given consent for GSA/GTA because there is no change of fuel falling under the category of primary fuel to the liquid fuel."
- 21. The APTEL judgment was also challenged by MSEDCL before the Hon'ble Supreme Court in Civil Appeal No.1922/2023, and the Hon'ble Court dismissed the



same vide its order dated 9.11.2023. Also, the Review Petition filed by MSEDCL against this order dated 9.11.2023 was rejected by the Hon'ble Supreme Court vide its order 19.3.2024. Thus, the Hon'ble Supreme Court's order confirming the Commission's order and the APTEL judgment as above and RGPPL's entitlement to the recovery of the fixed charges from MSEDCL, based on the interpretation of Articles 4.3 and 5.9 of the PPA cannot be ignored. It is pertinent to mention that the Commission vide its order dated 21.3.2017 in Petition No. 263/GT/2014 had determined the tariff of the generating station for the period 2014-19 and had also trued up the tariff for the said period vide order dated 8.3.2021 in Petition No. 434/GT/2020. Thereafter, the Commission, vide its order dated 25.10.2021 in Petition No. 410/GT/2020, approved the tariff of the generating station of RGPPL for the period 2019-24. Thus, the bills raised by RGPPL are in terms of the various tariff orders issued by this Commission in accordance with the relevant Tariff Regulations and based on the availability declared on a month-to-month basis. Though MSEDCL was arrayed as a party Respondent No.1 in all these tariff petitions/proceedings, no objection appears to have been raised and or placed on record by MSEDCL with regard to its liability to make the payment of the fixed charges to RGPPL, after 1.4.2014. As regards the issue of the supplies made by RGPPL to the Indian Railways, the same has been examined by the Commission in its order dated 8.3.2021 in Petition No. 434/GT/2020, the relevant portions of which are extracted below:

90. The above determined annual fixed charges and energy charges shall be recovered by the generating company on monthly basis, in terms of Regulation 30 of the 2014 Tariff Regulations, except for the capacity and period for which the generating station has operated under PSDF scheme of MOP by dedicating part capacity of the generating station. The tariff for the period under PSDF scheme has been dealt in succeeding paragraph

Xxxx



- 94. It is observed from the above that since the major beneficiary (Respondent No.1, MSEDCL) was not procuring power from the generating station, the Petitioner participated in the PSDF Fund based Gas Plant Revival Scheme of MoP, Gol during the year 2015-16 and 2016-17 and had supplied certain incremental energy to Indian Railways at a target rate of ₹4.70/kWh along with PSDF support ranging from Order in Petition No. 434/GT/2020 Page 47 of 47 ₹1.45/kWh to (-) ₹0.02/kWh. Post PSDF Scheme of MoP, GOI, the Petitioner has entered into a PPA with Indian Railways for supply of 540 MW, out of the allocation made to Respondent MSEDCL, at the fixed rate of ₹5.50 ₹/kWh.......Considering the fact that the Petitioner has supplied power to Indian Railways at price of ₹4.70/kWh along with PSDF support by operating a block comprising 663.54 MW capacity under the PSDF Scheme (for periods from 1.10.2015 to 31.3.2016; from 1.4.2016 to 30.9.2016, and from 1.10.2016-31.3.2017), no tariff is required to be determined separately for the capacity under PSDF Scheme.
- 95. For the periods when no supply was made by Petitioner under PSDF scheme, the recovery of fixed charges (as determined at para 88 above) by Petitioner shall be in terms of Regulation 30 of the 2014 Tariff Regulations, except for Indian Railways which had been supplied energy (post PDF) corresponding to 540 MW at fixed price of ₹5.50/kWh.
- 22. We also note that MSEDCL, vide its letter dated 14.3.2024 to RGPPL, had intimated the partial payment of Rs 500 crore (relating to invoices for outstanding dues, including monthly capacity charges and LPS from July 2013 onwards to January 2024) made earlier and had further assured RGPPL that the balance amount due, shall be paid in suitable installments as per the specific plan. Based on this, MSEDCL has temporarily closed the invoice on the PRAAPTI portal. However, despite the assurances by MSEDCL in the meetings under the aegis of the Ministry of Power on the finalization and payment of capacity charges, no attempt was made by MSEDCL to either reconcile or make payments to RGPPL, which resulted in RGPPL uploading the invoices in PRAAPTI portal, in terms of the Electricity (Late Payment Surcharge & other related matters) Rules, 2002 notified by the Ministry of Power, GOI in exercise of its powers under Section 176 of the Act. In terms of this, the power supply to MSEDCL was regulated with effect from 17.6.2024 (regulation of short-term open access) and

16.7.2024 (curtailment of 10% of the long-term access) respectively. Further, no deallocation of the MSEDCL's capacity allocated from RGPPL has been made by the Ministry of Power GOI, despite the several request letters of MSEDCL on this count.

Section 61(d) of the Act provides that the Tariff Regulations specified by the Commission shall be guided by the principles of safeguarding consumers' interest and, at the same time, for recovery of cost by the generators in a reasonable manner. RGPPL, having made upfront investments in establishing, operating, and maintaining the generating station, needs to service its capital cost during the lifetime of the station through the payments of annual fixed charges. RGPPL, in terms of the Tariff Regulations, read with the tariff orders issued by this Commission and, based on the monthly declared availability, has raised invoices on MSEDCL. Any denial of the payment of such fixed charges to RGPPL would not only result in the plant condition being deteriorated, but will also impact its viability. MSEDCL cannot, therefore, contend that RGPPL will not lose anything if the said amounts are not paid. The consumer's interest, as raised by MSEDCL, in our view, could have been best served had paid the monthly principal amounts to RGPPL, thereby avoiding any interest being levied on it for the delay. To us, the comparative hardship or inconvenience to RGPPL, which is likely to arise from granting interim relief to MSEDCL, will be greater than that which is likely to arise from withholding it. For the aforementioned reasons, we are of the considered view that the balance of convenience does not lie in favour of MSEDCL for the grant of interim relief in their favour, as prayed for.

Irreparable injury

24. As the grant of interim relief is discretionary, the exercise thereof is subject to the

Court satisfying itself that its interference is necessary to protect the party from the species of injury (Dalpat Kumar v Prahlad Singh [(1992)1SCC 719]. MSEDCL has mainly contended that any regulation of GNA or open access of MSEDCL under the LPS Rules in furtherance of the invoices will severely impinge on its ability to arrange a sufficient quantum of power to meet such peak demand. It has also stated that the curtailment of power is affecting MSEDCL's ability to procure inexpensive power on a short-term basis from power exchanges, etc., and is also affecting its ability to service its consumers, which may lead to potential load shedding. MSEDCL has added that since the imposition of regulation of access, it estimates the financial impact of such restriction is approximately Rs. 103 crores. Per contra, RGPPL has submitted that if MSEDCL were really concerned about consumer interest, it would have honoured the bills on the PRAAPTI portal to continue with the open access instead of raising the same issues before the Courts to get some interim order. Referring to the submission of MSEDCL in para 66 of the petition that only a claim of Rs 1400 crore for 2013-14 pertains to the period during which the PPA was in existence, RGPPL has argued that MSEDCL should be directed to pay the above-undisputed amount of Rs 1400 crores (for 2013-14) and Rs 471 crores, which became due till 22.8.2024, subject to the final decision of this Commission. While pointing out that the total amount to be recovered by it from MSEDCL is in excess of Rs 7000 crores till August 2024, RGPPL has submitted that the so-called consumer interest and the ability of MSEDCL to arrange adequate power for such consumers is bogus and an excuse to avoid making payments to RGPPL.

25. We have considered the submissions of the parties. As stated earlier, RGPPL has



executed a PPA dated 10.4.2007 with MSEDCL and, in terms of the tariff orders read with the Tariff Regulations, has raised invoices on MSEDCL for the payment of the fixed charges. Moreover, in terms of the orders/judgment of the Hon'ble Courts, it has become entitled to the recovery of the fixed charges, based on availability declaration, from the Respondent beneficiaries, which include MSEDCL. Further, the termination of the PPA by MSEDCL with effect from 1.4.2014 has been repudiated by RGPPL vide its letters dated 22.5.2014 and 3.6.2014, respectively, which issues are to be examined by the Commission during the proceedings in the main petition. Pending the final decision on the issue of termination of the PPA between the parties, MSEDCL cannot, therefore, be permitted to avoid the payment of the fixed charges to RGPPL, as per the monthly invoices, raised by it. Even otherwise, no irreparable injury would be caused to MSEDCL if interim payments are directed to be made to RGPPL, considering the fact that such payments are subject to a final decision in the main petition, and in case MSEDCL succeeds, it would be entitled to the recovery of the said amounts paid to RGPPL, along with interest. Therefore, the test of irreparable injury to MSEDCL is also not satisfied in the present case.

26. Considering the fact that neither the test of balance of inconvenience nor that of irreparable injury has been satisfied, MSEDCL is not entitled to the grant of interim reliefs as sought by them in the IA. IA stands disposed of in terms of the above. This is however, subject to the final decision of the Commission in the main petition.

27. It is evident from the submissions of RGPPL that a total amount recoverable from MSEDCL is in excess of Rs. 7000 crores, out of which an amount of Rs.1400 crores

related to the period 2013-14. However, it is noticed that an amount of Rs 471 crores was only payable by MSEDCL in terms of the invoices uploaded in the PRRAPTI portal by RGPPL to avoid the curtailment of power. Since MSEDCL is found not entitled to the grant of interim reliefs, as aforesaid, we direct MSEDCL to make the payment of Rs.471 crore to RGPPL within 15 days from the date of this order. Upon such payment by MSEDCL, RGPPL shall withdraw such restrictions from the PRAAPTI portal. The recovery of the balance amounts by RGPPL shall, however, await the final decision of this Commission in the main petition. Accordingly, we direct that no further coercive/precipitative action shall be taken by RGPPL with regard to the recovery of the balance amounts. Having said so, we direct RGPPL to ensure that the plant remains in operation.

28. We note that RGPPL has filed Execution Petition No.12/2023 before the APTEL seeking execution of the APTEL's judgment dated 22.4.2015 in Appeal No. 261/2013, and the same is pending consideration. Needless to say, the decision of the Commission, in this order, shall abide by the decision of APTEL in the said execution proceedings.

29. IA 67/2024 stands disposed of accordingly. The Registry is directed to list the main petition (Petition No. 276/MP/2024) for hearing during the third week of November, 2024.

Sd/-(Harish Dudani) Member Sd/-(Ramesh Babu.V) Member Sd/-(Jishnu Barua) Chairperson