

**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. 91 of 2020**

**Case of Maharashtra State Electricity Distribution Company Ltd. seeking approval to adoption of tariff under Section 63 of the Electricity Act 2003 for long term procurement of 210 MW power from M/s. Sai Wardha Power Generation Limited**

**Coram**

**I.M.Bohari, Member**  
**Mukesh Khullar, Member**

Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) .... Petitioner  
V/s

1. Sai Wardha Power Generation Limited (SWPGL)
2. Adani Power Maharashtra Limited (APML)
3. RattanIndia Power Limited (RIPL) .....Respondents

**Appearance**

For MSEDCL : Smt. Deepa Chavan, (Adv.)  
: Shri. Paresh Bhagwat (Rep.)

For SWPGL : Shri. Anand Ganesan (Adv.)  
: Shri. Vikas Gupta (Rep.)

For APML : Shri. M.R. Krishnarao (Rep.)  
: Shri. Akshay Mathur (Rep.)

For RIPL : Shri. Sameer Darji (Rep.)

**ORDER**

**Date:15 June 2020**

1. Maharashtra State Electricity Distribution Company Ltd. (MSEDCL), Prakashgad, plot no. G – 9, Anant Kanekar Marg, Bandra (east), Mumbai has filed the Case on 18 May 2020 seeking approval for adoption of tariff under Section 63 of the Electricity Act, 2003 (EA, 2003) for long term procurement of 210 MW power from M/s Sai Wardha Power Generation Limited (SWPGL).

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

a) To admit the Petition as per the provisions under Section 63 of the Electricity Act (EA), 2003.

b) To accord approval for adoption of tariff for procurement of 210 MW power at the levellized tariff rate of Rs. 3.28 per unit from M/s. Sai Wardha Power Generation Ltd.

c) To consider and approve the tariff stream as per the APML 1200 MW tariff with applicable year in line with APML 440 MW PPA as proposed by MSEDCL.

d) To consider and approve the PPA tenure in line with the balance tenure of APML 440 MW PPA as proposed by MSEDCL.

e) To consider specific units for supply of power as per the contracted capacity as mentioned by SWPGL.

f) To consider and approve the necessary changes in the standard PPA as submitted in paragraphs above.

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

3.1 The Commission in its Order dated 19 January 2019, which was issued subsequent to remand Order dated 10 February 2015 from Appellate Tribunal for Electricity (APTEL), has allowed MSEDCL to source power from plant of Sai Wardha Power Generation Ltd (SWPGL) located in Maharashtra. In the same Order, the Commission allocated 1090 MW of capacity amongst Adani Power Maharashtra Ltd. (APML), RattanIndia Power Ltd (RPL) and SWPGL as follows:

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

3.2 APML challenged above Order of the Commission on the grounds that APML is supplying 440 MW of power since 16 February 2017 and PPA has attained finality. Therefore, contracted quantum of 440 MW of APML should not be reduced.

3.3 APTEL issued its Judgement dated 11 March 2020 allowing appeal of APML with following ruling:

*“17. During the pendency of this appeal, Respondent No. 3 - Discom filed an Affidavit and made its preliminary submissions on distribution of quantum between*

*Rattan India Power Limited and Wardha Power Company Limited. Paras 21 and 22 of the said Affidavit are relevant, which read as under:*

*21. MSEDCL has signed the PPA with M/s APML for the quantum of 440 MW power at the levelised tariff of Rs.3.280/- p.u on 16.02.2013 as per State Commission MERC order dtd 27.12.2012. Accordingly, as per the PPA, from the CoD dtd 16.02.2017, Appellant is supplying the power to MSEDCL.*

*22. The answering Respondent submits that, the power purchase agreement has reached the finality and the power supply transactions under the PPA is mature hence it is not viable to reduce the contracted quantum of appellant at this juncture. Hence it is humbly requested to revise the power purchase quantum keeping intact the already signed PPA quantum of 440 MW of APML and allow signing PPA with revised quantum with M/s WPCL for 210 MW and M/s RNPL for 440 MW. The revised PPA quantum suggested is as follows:*

<i>Name of generator</i>	<i>Approved quantum by MERC</i>	<i>Proposed quantum (MW ) for PPA</i>
<i>APML</i>	<i>343</i>	<i>440</i>
<i>RNPL</i>	<i>507</i>	<i>440</i>
<i>WPCL</i>	<i>240</i>	<i>210</i>
<i>Total</i>	<i>1090</i>	<i>1090</i>

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

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

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

- 3.4 The APTEL, in para 17 has indicated that quantum of 1090 MW will remain intact, which inter-alia implies that the quantum of power for other generators to be revised as per the proposition of MSEDCL i.e for SWPGL 210 MW and for RPL 440 MW totalling to 1090 MW.
- 3.5 As per above Judgment of the APTEL, the quantum of power to be procured from SWPGCL needs to be revised to 210 MW from earlier approved quantum of 240 MW.
- 3.6 Thus, APTEL has ruled to restore 440 MW PPA of APML by allowing additional 97 MW power to APML in view of commencement of 440 MW power supply since 16 February 2017 against signed PPA and adoption of tariff by MERC which has attained finality. Therefore, PPA for power purchase of 440 MW with APML will remain in force. APTEL (at para 17) has indicated that quantum of 1090 MW will remain intact, which inter-alia implies that the quantum of power for other generators to be revised as per the proposition of MSEDCL i.e. for SWPGL 210 MW and for RPL 440 MW totalling to 1090 MW. Thus, as per above Judgment of APTEL, the quantum of power to be procured from SWPGL needs to be revised to 210 MW from earlier approved quantum of 240 MW.
- 3.7 After issuance of the Commission's Order dated 19 January 2020 and prior to the APTEL judgement dated 11 March 2020, MSEDCL issued LoI vide letter dated 20 February 2019 to SWPGL for unconditional consent for supply of power of 240 MW at a levelized tariff of Rs 3.28 per unit and submission of necessary documents for signing of PPA along with Contract Performance Guarantee (CPG) as per RFP. In response, SWPGL vide letter dated 26 February 2019 has given consent for supply of 240 MW power at levelized tariff of Rs. 3.28 per unit.
- 3.8 SWPGL vide letter dated 10 April 2019, informed that M/s. India Opportunities III PTE Ltd. the financial Creditor along with M/s. Vitra ITCL (India) Ltd. has filed Insolvency proceedings against SWPGL under section 7 of Insolvency and Bankruptcy Code, 2016 in NCLT, Hyderabad Bench. SWPGL further requested for signing of PPA before submission of CPG. MSEDCL vide letter dated 30 April 2019 refused such request and requested SWPGL to submit CPG before signing of PPA as per RFP conditions.
- 3.9 Again, vide letter dated 25 June 2019, SWPGL requested for extension upto 30 September 2019, due to NCLT matter. MSEDCL vide letter dated 20 July 2019 has granted such extension. However, CPG was not submitted. NCLT, Hyderabad Bench passed order on 17 October 2019 (but pronounced on 09 November 2019).
- 3.10 SWPGL vide its letter dated 03 December 2019 and further email dated 03 January 2020 informed about NCLT order and readiness of submission of CPG. Further vide letter dated 10 January 2020 also expressed desire to submit original CPG and other document as per requirement of RFP.

3.11 Further, SWPGL vide letter dated 24 February 2020 has offered additional discount of 1% over and above what is envisaged in the PPA for any payment made on or before due date, subject to a maximum of Rs. 40 lakhs per month citing the reason of financial crunch.

3.12 SWPGL vide its letter dated 26 February 2020 submitted the original CPG of Rs.72 Cr with validity date only up to 31 March 2020 and requested for signing of PPA. However, as per Clause 2.13 of RFP, CPG shall be initially valid for a period of three months after Scheduled Delivery Date. However, SWPGL had submitted CPG which was valid upto 31 March 2020. i.e valid for one month only.

3.13 MSEDCL vide its letter dated 03 March 2020, asked SWPGL for submission of bank guarantee with validity as per RFP provision and the necessary documents for signing of the PPA. SWPGL was also requested for consideration/ verification of following points before initialing of the PPA.

a. Applicability of tariff stream and commencement year:

As per the Commission's order dated 19 January 2019 tariff stream of APML 1200 MW PPA is applicable. However, for applicability of contract year, a year considering the same commencement year of supply of APML's 440 MW PPA i.e. FY 2016 -17, needs to be considered. For example, if 1 May 2020 is the date of commencement of power supply by SWPGL then as per tariff stream, 5<sup>th</sup> contract year tariff will be applicable. As the issue of allocation within 1090 MW capacity had arisen from the same effective date of signing of 440 MW PPA with APML, the 5<sup>th</sup> contract year tariff of APML's 440 MW PPA needs to be considered.

b. Effective Date:

SWPGL vide letter dated 17 April 2015 has agreed that the effective date shall be the same which is applicable to APML 440MW.

c. PPA tenure:

The Commission in its order dated 19 January 2019 has also indicated readiness of SWPGL to supply the power from immediate effect i.e from 1 April 2019 and passed the order accordingly. In view of this MSEDCL may consider a suitable date i.e. 1 May 2020 as COD date for commencement of the supply and accordingly the tenure of PPA will be in line with balance tenure of APML's 440 MW PPA, i.e. 22<sup>nd</sup> year will be anniversary year. Further extension of PPA may be mutually decided as per clause no 2.2.1 of the PPA.

d. Specifying the Units for Power supply:

SWPGL has informed vide letter dated 20 February 2015 that the Power Supply will be from units 1 and 2 (135 MW\*2).

e. Coal Linkages and non-compensation of shortfall in coal supply:

SWPGL in its letter dated 20 February 2015 and 17 April 2015 has mentioned about linkages of coal from WCL and balance from imported coal for supply of 240 MW

capacity. Further SWPGL has also confirmed for non-claiming of any shortfall impact vide its letter dated 21 May 2015.

f. Compliance of Environmental Norms:

SWPGL shall comply with environmental norms issued by Govt Instrumentality from time to time and shall not claim any such expense such as washing coal, transportation of fly ash etc from MSEDCL.

g. Installation of FGD:

As per the present norms generating stations are mandated for installation of FGD. SWPGL is to confirm whether the units specified for power supply to be considered under PPA are installed with FGD.

h. Operational Parameters:

SWPGL should inform operational parameters such as SHR and auxiliary consumption as per OEM along with supporting documents.

3.14 SWPGL vide its letter dated 11 March 2020 and 16 March 2020 submitted the requisite documents/ information/data and CPG of 72 Cr. valid upto 31 October 2020 for preparation of draft PPA. In these letters SWPGL has stated certain reservations/ difference of opinions.

3.15 Subsequently, MSEDCL vide email dated 12 May 2020, forwarded clear copy of the PPA to SWPGL requesting for initialling the same. SWPGL vide its email dated 13 May 2020 has submitted the copy of initialled PPA. However, vide letter dated 13 May 2020 SWPGL has informed that they have different views on certain points and requested that the letter be filed along with the initialled PPA to enable the Commission to clarify on the said issues. Further, SWPGL has indicated their readiness for Scheduled Delivery date (Power Supply commencement date) as 1 June 2020. SWPGL has also submitted Third party report showing healthiness of Generating Units on 13 May 2020.

3.16 Draft PPA is initialed on 13 May 2020 by MSEDCL (procurer) and SWPGL (Seller) purely for the submission before this Commission for adoption and approval purpose.

**4. SWPGL in its reply dated 24 May 2020 has stated as follows.**

4.1 MSEDCL has prayed for adoption of tariff of Rs. 3.28 per unit. However, said tariff was discovered and adopted in the competitive bidding process in the year 2009-10. Same has been adopted by this Commission in the Order dated 28 December 2010 in Case No. 22 of 2010. Further, this tariff has also been approved by the APTEL in the judgment in Appeal No. 70 of 2013. Said levelized tariff of Rs. 3.28 per unit, with the same tariff stream is applicable to the present case. Further, this tariff has already been accepted by the Commission and reiterated in the order dated 19 January 2019. Therefore, there is no requirement for any separate adoption of the said tariff once again.

4.2 While the parties have acted pursuant to the directions of the APTEL, for the PPA to be implemented, there are a few issues on which clarification is sought from the Commission in the petition.

a. Quantum of Power:

4.3 In the PPA, MSEDCL has sought to restrict the capacity to 210 MW, as against the 240 MW approved by the Commission for SWPGL in the order dated 19 January 2019. MSEDCL reliance on the APTEL Judgment dated 11 March 2020 in Appeal No. 50 of 2019 in this regard is misplaced. APTEL's above decision was rendered based on the averment of MSEDCL for procurement of additional 97 MW from APML, which was over and above the 1090 MW.

4.4 After making the specific averment before the APTEL for procurement of additional 97 MW from APML, it is not correct on the part of MSEDCL to change and reduce the quantum of SWPGL. This action would be contrary to the original decision of APTEL in relation to the 1090 MW, which has also been upheld by the Hon'ble Supreme Court.

4.5 In the circumstances, capacity of the PPA between MSEDCL and SWPGL ought to be 240 MW as has already been approved by the Commission.

b. Applicability of tariff stream and commencement year:

4.6 MSEDCL has proposed that the commencement year for the applicability of tariff needs to be FY 2016-17, which was the commencement year for the 440 MW PPA of APML. This position of MSEDCL is incorrect and the commencement year for the purposes of the first-year tariff needs to be FY 2020-21, when the supply of power would commence.

4.7 In terms of the APTEL judgment in Appeal No. 70 of 2013, SWPGL had in the year 2015 also offered to supply power from the same date and on the same tariff as applicable to APML from the first year of supply. The supply by APML was to begin in the year 2017 and the same would also be applicable to SWPGL, in terms of the consequential orders to be passed by the MERC.

4.8 Had the consequential Orders been passed by the Commission at that stage, the supply by SWPGL would have also begun from the year 2017. However, due to the interim Order dated 24 September 2015 passed by the Hon'ble Supreme Court in the Civil Appeal No. 5731 of 2015 filed by RPL, the Commission could not pass the consequential orders at that stage. In the meantime, APML began the supply of electricity from February 2017.

4.9 By Order dated 10 May 2018, the Hon'ble Supreme Court has dismissed the Civil Appeal filed by RPL and upheld the APTEL Order. Thereafter the Commission could pass the consequential Order dated 19 January 2019 allocating the proportionate capacity

amongst APML, RPL and SWPGL and thereby enabling the execution of the PPA between the parties.

- 4.10 In view of the above legal position, SWPGL could not execute the PPA. However, upon the dismissal of the Civil Appeal, the interim Order ceases to exist, and SWPGL is entitled to the full benefit of the APTEL Judgment.
- 4.11 The APTEL had placed all three parties, namely, APML, SWPGL and RPL in the same position, including in relation to tariff and the period of supply. The reference point was the previous bidding which concluded in 2012, wherein the tariff of APML of Rs. 3.28 per unit for 1200 MW was to be applied to all the three generators for the 1090 MW.
- 4.12 The Orders of the Commission, the APTEL and the Hon'ble Supreme Court do not provide for the effective date, but the Effective Date of a PPA is the date of the signing the PPA with the respective party (as may be defined in the respective PPAs). The Effective date of PPA of one of the parties could not be the Effective Date for all the parties.
- 4.13 The Commission had also in the Order dated 19 January 2019 considered the Effective Date for commencement of supply as 01 April 2019. In view of the subsequent NCLT proceedings, it has now been postponed to June 2020. However, the contention of MSEDCL of linking the Effective Date to the other PPA was neither raised earlier nor held so by the Commission.
- 4.14 Therefore, SWPGL is entitled to supply electricity for 25 years, as is also being the case in respect of supply by APML. The tenure of the PPA of SWPGL cannot be restricted to a shorter period.
- 4.15 Any other interpretation would amount to SWPGL being prejudiced in relation to its substantive rights, in view of the interim Order of the Supreme Court, when the final decision has been in favour of SWPGL. It is a well settled principle of law that the acts of court cannot prejudice any person. Further, when the final order is in favour of SWPGL, SWPGL is entitled to be restituted and placed in the same position as if there was no interim Order. On this issue SWPGL has relied upon the decision of the Hon'ble Supreme Court in the case of Karnataka Rare Earth v. Deptt. of Mines & Geology, (2004) 2 SCC 783.
- 4.16 Independent of the above, it is submitted that the fundamental basis of tariff determination in a long term PPA with a tariff trajectory decided either in the competitive bid process or in the proceedings before the Commission. Even in the case of executed PPA though the effective date of the PPA is from the date of the signing of the PPA, the duration of 25 years is from the commencement of the supply of power. If for any reason the generator is unable to commence supply of power, the commencement of the supply is the date from which the period of 25 years is to be counted.



- 4.17 In any event, when the PPA is to be applicable for 25 years, the tariff stream for 25 years is also applicable and the first-year tariff would be applicable from the date the supply of power commences. It is pertinent to note that as per the Tariff schedule in the Bid, the first year Tariff pertains to the period from the “Scheduled Delivery Date to the end of the Financial Year” and so on.
- 4.18 It would not be correct to rely on the communication of SWPGL in the year 2015 for commencing supply as that of APML, when subsequently due to the interim order of the Supreme Court, even the PPA could not be executed.
- 4.19 Even if it is assumed that the effective date has to be reckoned as the deemed date of commencement of supply and reduce the term of the Agreement to 21 years and effective Tariff of 1<sup>st</sup> year to be the 5<sup>th</sup> year, at the same breadth SWPGL should be entitled to capacity charges for the said period on deemed available Capacity. It is pertinent to note that SWPGL had kept the offered capacity available and had not profitably contracted the capacity in the interregnum with any other procurers.
- 4.20 Since the execution of the PPA itself got deferred due to the interim Order and the matter has finally been decided in favour of SWPGL, it is submitted SWPGL is entitled to supply power for the entire duration of 25 years from the date of commencement of supply and at the tariff stream for 25 years as approved by the Commission.

c. PPA Tenure:

- 4.21 In view of the submissions on the above issue, the Commission may clarify that the term of the PPA shall be for 25 years and not for the shorter duration as is sought for by MSEDCL.

d. Specific Units of Power Supply:

- 4.22 MSEDCL has proposed to identify the supply from only two units of the generating station of SWPGL. For this purpose, MSEDCL has sought to rely on communication dated 20 February 2015 of SWPGL.
- 4.23 It is stated that the bid documents or the PPA entered by MSEDCL with any of the bidders or even the PPA with APML for 440 MW does not identify any particular units for supply. There is no such requirement under the PPA or the bid documents which were invited by MSEDCL.
- 4.24 The units of SWPGL are of the same size and configuration. There are no variations in the technical parameters, computation of coal consumption etc. as is stated by MSEDCL. Further, there can also be no issue whatsoever in relation to the amount of power supplied as is sought by MSEDCL. This is established by the very fact that there is no requirement of specifying units for supply in the bid documents itself.

- 4.25 There can also be no issue on operational flexibility in giving schedule by MSEDCL. It is for MSEDCL to give its schedule as per the Grid Code in relation to the availability declared by SWPGL. The issues of backing down and technical minimum are grid conditions to be ensured by the SLDC. In any event, the identification of units is irrelevant for this purpose.
- 4.26 On the other hand, supply from the generating station as a whole gives more flexibility to the SLDC and also to SWPGL to manage the total contracted capacity amongst the available units. If for example, if the total schedule given is only 220 MW amongst all the contracts entered into by SWPGL, the technical parameters would require only two units run to cater to the entire capacity, which would not be technically possible as per the proposal given by MSEDCL.
- 4.27 Further, it is in the interest of MSEDCL to be entitled to the capacity from the available units and in case any particular unit is under planned or unplanned shutdown, MSEDCL can avail the capacity from other units under the PPA.
- 4.28 For the reasons stated above, and particularly there being no requirement under the bid documents or the PPA executed with the other generators, and also that it is more beneficial for MSEDCL to procure from the generating station as a whole, the specification of the units for supply is not required and the supply shall be from the Power Station.

**5. MSEDCL in its Rejoinder dated 26 May 2020 has submitted as follows.**

a. Quantum of Power

- 5.1 MSEDCL in its reply in Case No 53 of 2012 had requested the Commission to keep the quantum of APML's 440 MW PPA intact as it had started supplying power from 16 February 2017 as per agreement dated 16 February 2013 and the agreement has reached finality/maturity. MSEDCL further requested the Commission to allow to sign PPA with SWPGL for 210 MW and with RPL for 440 MW out of balance quantum of 1090 MW without reducing APML quantum.
- 5.2 However, the Commission vide its Order dated 19 January 2019, disallowed the request of MSEDCL and has allocated 1090 MW power in compliance with APTEL judgment dated 10 February 2015 regarding pro-rata allocation.
- 5.3 Subsequently, APML had filed Appeal No. 50 of 2019 before APTEL seeking directions against the Commission's order dated 19 January 2019 on the grounds that APML is supplying 440 MW of power since 16 February 2017 and PPA has attained finality and therefore, contracted capacity of 440 MW of APML should not be reduced.
- 5.4 MSEDCL while replying to APML's Appeal No 50 of 2019 has submitted on the same lines as it had earlier submitted before MERC in Case No 53 of 2012 and had given two

options regarding allocation of quantum. The relevant paragraphs are reproduced as follows:

21..... MSEDCL has signed the PPA with M/s APML for the quantum of 440 MW power at the levelised tariff of Rs.3.280/- p.u on 16.02.2013 as per State Commission MERC order dtd 27.12.2012. Accordingly, as per the PPA, from the CoD dtd 16.02.2017, Appellant is supplying the power to MSEDCL.

22. The answering Respondent submits that, the power purchase agreement has reached the finality and the power supply transaction under the PPA is mature hence it is not viable to reduce the contracted quantum of appellant at this juncture. Hence it humbly requested to revise the power purchase quantum keeping intact the already signed PPA quantum of 440 MW of APML and allow signing PPA with revised quantum with M/s. WPCL for 210 MW and M/s.RNPL for 440 MW. The revised PPA quantum suggested is as follows:

Name Of generator	Approved quantum by MERC	Proposed quantum (MW) for PPA
APML	343	440
RNPL	507	440
WPCL	240	210
Total	1090	1090

23. Considering the recent Power demand scenario, MSEDCL humbly request hon'ble tribunal may allow the respondent to procure the additional power of 97 MW which is discovered through competitive bidding as below:

Name Of generator	Approved quantum by MERC	Proposed quantum (MW) for PPA
APML	343	440
RNPL	507	507
WPCL	240	240
Total	1090	1187

Thus, in its options, MSEDCL had proposed additional 97 MW power either by keeping the 1090 MW quantum intact or by enhancing the quantum to 1187 MW.

5.5 APTEL after hearing in the matter has passed the order dated 11 March 2020 (Relevant part of APTEL judgment is reproduced at para 3.3. of this Order). APTEL in para 17 of its judgment has clearly indicated the quantum of 1090 MW remain intact and disallowed MSEDCL's proposition of 1187 MW quantum.

5.6 As per above Judgment of APTEL, the quantum of power to be procured from SWPGL needs to be revised to 210 MW from earlier approved quantum of 240 MW. Accordingly, MSEDCL has requested the Commission for adoption of tariff of 210 MW quantum of power.

b. Applicability of Tariff Stream and Commencement Year:

- 5.7 Tariff stream quoted for 25 years as per competitive bidding guidelines has two parts. i.e. fixed charge and variable charges. The variable charges are payable against the energy supplied and fixed charges are payable against the capacity declared i.e availability declared by generators. Conventionally, the expenses such as O & M, depreciation, interest on long term loan, RoE etc are accounted for in fixed charge and fuel related expenses are covered in energy charge.
- 5.8 In the competitive bidding, option was given to generators to quote tariff considering expenditures and investments made, and generators have quoted the tariff computing fixed charge and energy charge after including and considering all the components. Accordingly, the tariff discovered was evaluated and adopted by the Commission.
- 5.9 It is pertinent to note that the commencement of power from SWPGL PPA is not same as 1200 MW PPA. The PPA of 1200 MW was signed on 31 March 2010 and the commencement of power started from 31 March 2014.
- 5.10 However, in case of SWPGL units are installed 10 years back. During this period depreciation, interest on long term loans, Return on Equity etc for these years have already been paid for and part of the capital cost must have already been recovered in these 10 years.
- 5.11 Therefore, though the tariff stream of 1200 MW is applicable to the 210 MW PPA, applicability of 1<sup>st</sup> anniversary year tariff is not acceptable.
- 5.12 Hence, MSEDCL submits that the PPA need to be treated similar to 440 MW PPA of APML, the applicability of tariff for first year has to be in line with the present tariff of 440 MW PPA i.e. 5<sup>th</sup> year tariff as per the tariff stream has to be made applicable for supply of power from SWPGL in FY 2020-21.
- 5.13 In case, the Commission is of the view that the tariff of 1<sup>st</sup> anniversary year is applicable then in that case as per the SBD and according to the PPA provision, the commencement of power supply will be after 48 months ( 4 years) from the signing of the PPA i.e. from June 2024.
- 5.14 In view of above submissions, MSEDCL has proposed to consider the 5<sup>th</sup> year tariff for supply of power in FY 2020-21 from SWPGL in line with the 440 MW PPA of APML.

c. PPA Tenure:

- 5.15 Considering the COD date for commencement of the supply as 1 June 2020 and applicability of tariff year as 5<sup>th</sup> anniversary year as that of 440 MW PPA of APML, the tenure of PPA will be in line with balance tenure of APML's 440 MW PPA, i.e. 22<sup>nd</sup> year will be last anniversary year. Further, there is provision for extension of tenure under clause no 2.2.1 of the PPA.

d. Specific Units of Power Supply :

5.16 If specific units are indicated in the PPA, then it is easy to handle following issues :

- i. For making payments of change in law, calculation of coal consumption, the technical parameters of the units are essential.
- ii. Maintaining account of power supplied (as balance capacity of the plant is untied)
- iii. Having operational flexibility in giving schedule to SWPGCL and backing down in the event of fluctuation in demand etc. (In the event units are not specified and SWPGL sells balance power in short term through exchange, then it may not be possible to back down on account of issues such as technical minimum & must run power for exchange)

5.17 The Commission has already sanctioned/ approved MSEDCL's unit specific PPA of 1320 MW with APML. Further, unit specific contracted capacity has also been defined in the PPA entered with JSW Energy Ltd, for 300 MW quantum.

5.18 SWPGL is having 4 units of 135 MW Capacity with aggregate capacity of 540 MW. Out of the total plant capacity, PPA is proposed to be initialled for 210 MW capacity (part of the capacity) which would be met out from any 2 units of the plant and the same need to be specified in the PPA.

6. At the e-hearing held on 29 May 2020, MSEDCL and SWPGL reiterated its submissions in the Petition and agreed to file written arguments. APML and RPL has requested additional time for filing of reply. The Commission reserved the matter for final Orders.

**7. MSEDCL in its written argument dated 08 June 2020 has stated as below:**

7.1. SWPGL has erroneously contended that APTEL has directed 1187 MW as the aggregate quantum. For considering this issue, it is pertinent to note certain facts of the case as they have transpired, particularly with reference to the submissions made by MSEDCL in relation to quantum of power before this Commission as well as the APTEL:

- a. MSEDCL had proposed to procure 1090 MW of additional quantum of power (RPL 650 MW and APML 440 MW) considering uncertainties in existing projects in the year 2011.
- b. Cabinet Sub-Committee, Government of Maharashtra (GoM) under Chairmanship of Chief Minister had approved the procurement of 1090 MW of Power in the Sub-committee meeting held on 9 November 2011.

- c. Accordingly, MSEDCL had filed Petition (Case No. 53 of 2012) before MERC seeking approval for procuring additional 1090 MW of power against same tariff bidding process of Case I Stage II.
- d. MERC vide its order in Case No 53 of 2012 dated 27 December 2012 had approved quantum of 1090 MW of power i.e. 650 MW from RPL and 440 MW from APML.
- e. SWPGL filed Appeal No.70 of 2013 before APTEL challenging the MERC's Order dated 27 December 2012. APTEL vide order dated 10 February 2015 directed MSEDCL to approach RPL and SWPGL (qualified bidders in last bid) to give their offers for long term supply matching the levellised tariff of Rs. 3.28 per unit. There was no change in quantum of 1090 MW power purchase in APTEL's order dated 10 February 2015 in Appeal No. 70 of 2013.
- f. SWPGL filed an application before MERC in Case No 53 of 2012 seeking directions to MSEDCL thereof for signing the PPA. MSEDCL has made submission before MERC that as PPA with APML has reached the finality and is mature hence it is not viable to reduce the contracted quantum of APML at this juncture. Accordingly, MSEDCL has proposed purchase of 1090 MW of power as below:

<b>Name of generator</b>	<b>Proposed Quantum (MW)for PPA</b>
APML	440
RNPL	440
WPCL	210
Total	1090

There was no change in quantum of 1090 MW power purchase in MSEDCL's submissions in the second round of the litigation before the MERC.

- g. MERC passed Order in Case No. 53 of 2012 on dated 19 January 2019 with revise allocation of quantum as follows:

<b>Name of generator</b>	<b>Revised Quantum (MW)</b>
APML	343
RNPL	507
WPCL	240
Total	1090

There was no change in total quantum of 1090 MW in MERC's order.

- h. Aggrieved by above order of MERC, APML filed Appeal No. 50 of 2019 before APTEL. MSEDCL filed its submission dated 5 April 2019 before APTEL. In its submission, MSEDCL has not changed quantum of 1090 MW. However, as MSEDCL was extremely concerned of the fact that neither RPL nor SWPGL were in a position to supply and had therefore, dealt with the then power demand scenario in its submissions. Therefore, Paragraphs 22 and 23 of MSEDCL's submission before the

APTEL, details different scenarios, on the probability of the APTEL not accepting the first scenario contemplated in Paragraph 22.

- i. APTEL has passed the judgment in Appeal No. 50 of 2019 on 11 March 2020 restoring 440 MW PPA of APML by allowing additional 97 MW power to APML in view of commencement of 440 MW power supply since 16 February 2017 against signed PPA and adoption of tariff by MERC which has attained finality. Therefore, PPA for power purchase of 440 MW with APML will remain in force.
- j. APTEL in para 17 of its judgment has indicated that quantum of 1090 MW shall remain intact, as the APTEL has clearly extracted the submissions of MSEDCL. Therefore, the quantum of power for other generators may be revised. Accordingly, the quantum of power for SWPGL stands revised to 210 MW instead of 240 MW and quantum of power from RPL stands revised as 440 MW instead of 507 MW.
- k. APTEL in para 19 has clearly mentioned that other Respondent shall proceed to request the MERC to proceed on the request of MSEDCL, which requires procurement of additional power of 97 MW.

7.2. Therefore, it is amply clear that the APTEL did not alter or modify the quantum of 1090 MW in any manner. Thus, the total quantum to be procured by MSEDCL has remained 1090 MW throughout the proceedings. Accordingly, the quantum of the power to be procured from SWPGL stands revised to 210 MW

7.3. In respect of Applicability of tariff stream, Effective Date and Commencement year, SWPGL had confirmed that it will abide by the same terms and conditions including the same tariff stream as of APML in terms of the directions of the APTEL. Accordingly, MSEDCL in its proposed PPA has considered the APML's commencement year of supply i.e. FY2016-17. Accordingly, the Tariff stream for the SWPGL will also be that of 5<sup>th</sup> year and not 1<sup>st</sup> year as demanded by it.

7.4. The procurement by MSEDCL is under Section 63 of the Act. The RFP issued provided for commencement supply of power from the Scheduled Delivery Date (SDD). As per Clause 4.1.1 this SDD shall be four (4) years from the effective date. Therefore, SWPGL cannot approbate and reprobate on the issue of applicability of the terms and conditions of RFP. It cannot also be the contention of M/s. SWPGL that subsequent events as they have transpired, should be factored in vis-à-vis itself. For example, SWPGL had an insolvency proceeding which greatly hampered and delayed its commitment in the transaction in 2019 despite a solemn commitment being made about the date of supply to this Commission. Therefore, the subsequent event as they have transpired and affected both the parties need to be factored in.

7.5. SWPGL has relied on the principle of law that acts of court cannot prejudice any person. SWPGL contends that it cannot be put to a monetary loss, on account of the interim order dated 24 September 2015 in Civil Appeal No. 5731 of 2015 passed by the Supreme Court

in an Appeal filed by RPL. It is the case of SWPGL that due to the interim order it was precluded from entering into a PPA with the MSEDCL and therefore, the SWPGL cannot be prejudiced. In support of this contention the SWPGL relied on Para 10 of the Karnataka Rare Earth v. Deptt. of Mines & Geology, (2004) 2 SCC 783. However, the said judgement in Karantaka Rare (supra) completely supports the case of the MSEDCL. SWPGL seems to contend that it was alone affected by the interim order passed by the Supreme Court. However, the MSEDCL was equally affected and subject to the said order. The interim order was not passed at the instance of the MSEDCL. Therefore, the ratio Karnataka Rare (supra) has to be applied to the MSEDCL as well.

7.6. In respect of PPA tenure, MSEDCL submits that in light of FY 2016-17 as the commencement year of supply, the PPA with the SWPGL could only be entered for the period of 22 years as the PPA with APML would also expire in year 2042.

7.7. In respect of identifying Generating Units for Power supply, during hearing on 29 May 2020, SWPGL had urged that such specification is not provided in respect of APML. However, this is factually incorrect. In the PPA dated 14 August 2008 executed with APML for 1320 MW supply the units are specifically mentioned. In the latter PPA with APML dated 31 March 2010 for 1200 MW as units 2 and 3 were already identified, specified and tied up there was no need to mention the remaining units, which were Unit 1, 2 and 5. Thus, the PPAs duly specified the said units.

7.8. Subsequent events and circumstances qua both the parties need to be factored in while dealing with the contentious issues. MSEDCL suffered because of the interim order dated 24 September 2015 in Civil Appeal No. 5731 of 2015 passed by the Hon'ble Supreme Court, in the Appeal filed by RPL. The correspondence on record, particularly, the communications exchanged between the parties in 2015 including the letter of the SWPGL dated 20 February 2015 are a clear pointer to the intending execution of PPA in 2015 which was stalled due to the interim order at the instance of RPL. The subsequent duration and events have to be considered for both the parties and there cannot be selective reliance on subsequent events at the instance of the SWPGL. The bid filed by the SWPGL proposed supply from its Chhattisgarh Plant. SWPGL was permitted to modify the same to provide supply from Maharashtra Plant. Therefore, the RFP by the order dated 19 January 2019 factored in subsequent events and then present scenario. If the parties are to strictly go by the RFP then SWPGL will have to commence its supply from SDD as provided in the RFP (i.e.) four (4) years post the effective date. Therefore, subsequent events which includes the requirement of both the parties which needs to be duly factored, in equally.

## **8. APML in its submission dated 09 June 2020 has stated as follows.**

8.1. Taking into consideration the fact that PPA qua APML is already in place and in operation since 2017, the APTEL vide Judgment dated 11 March 2020 in Appeal No. 50 of 2019 approved the PPA and tariff for procurement of 440 MW quantum from APML.



8.2. Under Section 63 of the Electricity Act, 2003, this Commission in tariff adoption petition can either adopt the tariff or reject the tariff. In the present case, the Petition filed by MSEDCL is for adoption of Tariff under Section 63 in respect of the power to be procured from SWPGL. Hence, the scope of this Petition is limited only to the PPA between MSEDCL and SWPGL.

8.3. In view of the above and in the light of APTEL judgment dated 11 March 2020, there is no scope for interfering with APML's PPA which has attained finality and is in operation since 2017.

8.4. In view of the foregoing submissions, APML request the Commission to allow continuation of 440 MW APML's PPA with MSEDCL.

**9. RIPL in its submission dated 09 June 2020 has stated as follows:**

9.1. APTEL Judgment dated 11 March 2020 approved the procurement of 440 MW from APML on the premise that MSEDCL will obtain permission for procurement of additional 97 MW in order to accommodate procurement of 440 MW from APML. This is evident from Paragraphs 22 and 23 of MSEDCL's reply in Appeal No. 50 of 2019, in terms of which it intended to procure 507 MW from RPL. Thus, the revision in power procured from APML was not to affect the capacity to be scheduled from RPL and SWPGL.

9.2. The APTEL has merely reproduced a part of MSEDCL's reply in Para 17 of its Judgment dated 11 March 2020. Thereafter, the APTEL has directed MSEDCL to approach this Commission for procurement of additional power of 97 MW over and above the 1090 MW. At no juncture has the APTEL implied or indicated that the initial power allocated by this Commission to RPL and SWPGL be revised.

9.3. In view of the foregoing, it is prayed that this Commission hold that it is binding for MSEDCL to procure power in terms of the MERC Order dated 19 January 2019 and that quantum to be procured from SWPGL and RPL not be reduced.

**10. SWPGL has submitted its written submission dated 10 June 2020 as follows:**

10.1. Though MSEDCL has sought adoption of the levelized tariff of Rs. 3.28 per unit, the said tariff has already been approved by the APTEL in the judgment in Appeal No. 70 of 2013. The levelized tariff of Rs. 3.28 per unit, with the same tariff stream is applicable to the present case. This tariff has also already been accepted by the Commission and reiterated in the order dated 19 January 2019. Therefore, there is no requirement for any separate adoption of the said tariff once again.

10.2. While MSEDCL and SWPGL have also agreed upon and initialled the PPA to be entered into, there are certain specific issues on which there are differing views between the parties on which clarification from the Commission is required.

- 10.3. Regarding Capacity issue, SWPGL stated that after making the specific averment before the APTEL for procurement of additional 97 MW from APML, it is not correct on the part of MSEDCL to change the quantum of SWPGL by reducing the quantum as against APML. This would otherwise be contrary to the original decision of the APTEL in relation to the proportionate allocation of 1090 MW, which has also been upheld by the Supreme Court. The operative portion of the Order in para 20, the APTEL allows the appeal, in so far as the APML is concerned permitting / approving additional power requirement of MSEDCL for supply of 440 MW from APML. The Order does not set aside the quantum allocated by this Commission, to the other generators, namely SWPGL and RPL in the order dated 19 January 2019.
- 10.4. In the circumstances the capacity of the PPA ought to be 240 MW as has already been approved by the Commission. Alternative and without prejudice to the above contention, that at present the entire 1090 MW itself is not flowing to MSEDCL. The Commission in the order dated 19 January 2019 had also given the direction that till the time the supply from the other two generators begin, the supply of 440 MW by APML shall continue. Applying the same principle, till the time the supply by RPL commences, SWPGL should be entitled to supply the entire capacity. SWPGL had offered the capacity of 310 MW, which is in fact reduced to 240 MW on account of the proportionate division between the three generators. Therefore, SWPGL should be entitled to supply the entire capacity of 310 MW and in any event the capacity of 240 MW in the meantime.
- 10.5. There is also no dispute between the parties that the supply is to commence from 1 June 2020, as has been agreed to in the PPA. The supply commencement is postponed, only pending the approval in the present petition and the supply will commence immediately upon the orders in the present petition. The only issue for clarification is the tariff that will be applicable for the supply commencing in June, 2020.
- 10.6. MSEDCL has proposed that the commencement year for the applicability of tariff needs to be 2016-17, which was the commencement year for the 440 MW of APML. This position of MSEDCL is not correct. This issue stands concluded by the order dated 19 January 2019 of the Commission, wherein the Commission has already held that the levelized tariff of Rs. 3.28 per unit for 25 years shall be applicable under the PPA. When the tariff of Rs. 3.28 per unit levelized tariff is to apply, it has to apply for 25 years, which is the period considered for the levelisation of tariff. Otherwise, the tariff of Rs. 3.28 per unit itself does not work out. This issue of applicable tariff has attained finality and cannot be sought to be reopened by MSEDCL at this stage.
- 10.7. The contention of MSEDCL that the plant of SWPGL is about 10 years old and therefore depreciated, is irrelevant to the present proceedings. The tariff applicable is discovered in a competitive bidding process. For such tariff, the actual costs and expenses are irrelevant.
- 10.8. Since the execution of the PPA itself got deferred due to the interim order and the matter has finally been decided in favour of SWPGL, it is submitted SWPGL is entitled to

supply power for the entire duration of 25 years from the date of commencement of supply and at the tariff stream for 25 years as approved by the Commission.

- 10.9. MSEDCL has proposed to identify the supply from only two units of the generating station of SWPGL. It is stated that the bid documents or the PPA entered into by MSEDCL with any of the bidders or even the PPA with APML for 440 MW does not identify any particular units for supply. There is no such requirement under the PPA or the bid documents which were invited by MSEDCL
- 10.10. As there being no requirement under the bid documents or the PPA executed with the other generators, and also that it is more beneficial for MSEDCL to procure from the generating station as a whole, the specification of the units for supply is not required and the supply shall be from the Power Station.
- 10.11. Without prejudice to contention that the supply of power will be from the Power Station (4 x 135 MW of SWPGL), even assuming that the supply of power is being identified to certain of the Units of SWPGL, such identification has to be defined in the definition of “Power Station” and not under the definition of “Contracted Capacity” as is sought to be done by MSEDCL. As per the standard definition of Contracted Capacity, as per the Case-1 Bidding guidelines, Contracted Capacity is read as the Aggregated Contracted Capacity. Both Contracted Capacity and Aggregate Contracted Capacity are used inter-changeably in the PPA and as such, it would not be correct to give separate definition to both.

### **Commission’s Analysis and Ruling**

11. The Commission notes that in the matter of procurement of 1090 MW of power, parties have challenged certain issues from previous orders of this Commission before higher judicial fora in two rounds of litigations. Hence, before adjudicating issues in present case, the Commission finds it necessary to mention sequence of event which has led to present proceedings:

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

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

11.2. The Commission vide its Order dated 28 December 2010 adopted the following tariff discovered through competitive bidding process for 2000 MW (-20%/+30%):

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

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

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

11.5. SWPGL filed Appeal against above Order in Appeal No. 70 of 2013. APTEL, vide judgment dated 10 February 2015 remanded the matter to the Commission with following rulings:

- a. The State Commission under Section 86(1)(b) of the Act has powers to regulate the procurement of power by the distribution licensee. The approval for procurement of additional quantum of power for 1090 MW for meeting the anticipated shortfall in supply due to some exigencies as indicated in the order by the State Commission is, therefore, in order.
- b. RPL-Nashik and the SWPGL should have been given an opportunity to match the price of Rs. 3.280 per kWh (levellised) offered by APML which was earlier approved by the State Commission by its order dated 28 December 2010. It was not correct for the State Commission to have adopted a tariff of Rs. 3.420 per kWh for procurement from the RPL-Nashik which was agreed after negotiations without giving an opportunity to SWPGL to match the tariff with the lowest offer.
- c. APTEL directed MSEDCL to approach RPL-Nashik and the SWPGL who were the qualified bidders to give their offers for long term supply matching the levellised tariff of Rs. 3.280 per kWh. In case both RPL-Nashik and the Appellant are able to offer matching the tariff of Rs. 3.280 (levellised), additional procurement of power (1090 MW) shall be approved by the State Commission amongst APML, RPL-Nashik and the SWPGL on pro-rata basis on the quantum offered by them i.e. in the ratio of 440 MW, 650 MW and the quantum offered by the SWPGL on long term basis respectively.

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

- a. Source of Power being offered by SWPGL were never argued before the APTEL.

- b. As State Commission had initiated proceedings on APTEL judgment dated 10 February 2015, State Commission shall decide the issue of source of power being offered by SWPGL as per law.

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

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

- a. SWPGL is allowed to source power from its power plant located at Maharashtra instead of Chhattisgarh mentioned in the bid
- b. 1090 MW of power was reallocated amongst the qualified bidders as per principles laid down in APTEL Judgment dated 10 February 2015 as follows:

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

- c. Rate of power procurement will be Rs. 3.280 per unit (levellised) at Maharashtra STU periphery as per APML's bid for 1200 MW under 2000 MW bidding. 25 year Tariff stream identical to APML's 1200 MW bid should be used for signing of PPA.
- d. APML's existing PPA of 440 MW needs to be revised for reduced contracted capacity of 343 MW. However, till power supply from RPL gets commenced, APML is allowed to continue with 440 MW PPA

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

11.10. Subsequent to above judgment of APTEL, MSEDCL has filed present Petition for adoption and approval of 210 MW PPA with SWPGL.

12. In this background of series of litigations, the Commission now deals with issues in present Petition. The Commission notes that present petition has been filed for adoption of rate and approval of PPA under Section 63 of the EA, 2003. In normal circumstances, when such Petition is filed for approval of the Commission, both parties i.e. buyer and seller submit an initialled PPA on mutual consent without any dispute. However, due to series of litigation as summarised at para 11 above, both parties in present matter have difference of

opinion on certain aspects of PPA and have requested the Commission to decide on these issues. Although, PPA initialled by SWPGL and MSEDCL has been filed with the Petition, SWPGL's letter dated 13 May 2020 stating its difference of opinion on the issues of Contracted Capacity, 1<sup>st</sup> year tariff, PPA tenure and identification of Units in power plant for PPA has also been filed along with the Petition. Based on submissions during the proceeding of this case, the Commission frames following issues which need to be decided in present matter:

- a. Whether fresh adoption of tariff is required?
- b. What should be Contracted Capacity under the PPA?
- c. What tariff should be applicable to 1<sup>st</sup> year and what should be tenure of PPA?
- d. Whether identification of Units from power plant mandatory under the PPA?
- e. Other understandings between the parties

13. Before dealing with above issues, as this case has been filed under Section 63 of the EA, 2003, the Commission would like to take on record APTEL judgment dated 16 December 2011 in Appeal No. 82 of 2011 providing ruling on powers available with the Commission while dealing with tariff adoption cases under Section 63 of the EA, 2003. Relevant part of said APTEL Judgment is reproduced below:

*“(A) The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act. The powers of the State Commission are limited under Section 63 of the Act.*

*The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central government's guidelines, standard document of Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with*

*market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act. If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines. In this case the above procedure had not been followed. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation with 3rd party to reduce the tariff.”*

Thus, the Commission’s power under Section 63 of the EA, 2003 is limited to adopting such tariff if it is discovered through transparent process of bidding and is reflective of market conditions or reject such tariff if it is not as per statutory framework of competitive bidding guidelines. With this background, the Commission is now dealing with the issues framed at para no. 12 above.

#### **14. Issue a: Whether fresh adoption of tariff is required?**

- 14.1. MSEDCL has filed this Petition praying for adoption of tariff at the levelized tariff rate of Rs. 3.28 per unit. Whereas, (SWPGL)WPGCL has contended that fresh adoption of tariff is not required as the said rate has already been adopted by the Commission in its earlier Order dated 28 December 2010 and also been upheld by the APTEL and thereafter reiterated by the Commission in Order dated 19 January 2019.
- 14.2. In this regard, the Commission notes that as summarized at para 11 above, levelized rate of Rs. 3.28 per unit has been discovered through competitive bidding conducted by MSEDCL for procurement of 2000 MW power and same has been adopted by this Commission vide its Order dated 28 December 2010. Further, while remanding matter to the MERC for reallocation of 1090 MW capacity on proportionate basis, the APTEL vide its judgment dated 10 February 2015 has directed that such reallocated capacity shall be contracted at levelized rate of Rs. 3.28 per unit. Accordingly, the Commission vide its Order dated 19 January 2019 has reallocated capacity at levelized tariff of Rs. 3.28 per unit.
- 14.3. In view of above, in the opinion of the Commission, levelized rate of Rs. 3.28 per unit for 1090 MW capacity has achieved finality and hence no fresh adoption of tariff is required in present matter which is part of the said 1090 MW capacity.

## 15. Issue b: What should be Contracted Capacity under the PPA?

15.1. MSEDCL has proposed 210 MW as a contracted capacity for the PPA with SWPGL. While defending its stand, MSEDCL stated that total quantum of power procurement in this process was always limited to 1090 MW. APTEL in its recent judgment dated 11 March 2020, while allowing restoration of APML's capacity to 440 MW, did not allow increase in total quantum of power procurement of 1090 MW. Therefore, to maintain the limit of 1090 MW, MSEDCL has reduced the capacity of SWPGL from 240 MW to 210 MW.

15.2. SWPGL has opposed this contention of MSEDCL and stated that in recent judgment dated 11 March 2020, APTEL has allowed restoration of APML's PPA based on MSEDCL's proposal to buy additional 97 MW power. Such additional procurement does not reduce SWPGL's allocated quantity of 240 MW. Reduction in quantity from 240 MW to 210 MW will contravene APTEL's initial judgment dated 10 February 2015 which directs proportionate allocation of 1090 MW.

15.3. In this regard, it is important to refer relevant part of APTEL's judgment dated 11 March 2020:

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

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

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

Thus, based on MSEDCL's submission before the APTEL (reproduced at para 5.4 of this order) that it seeking additional procurement of 97 MW, APTEL has allowed MSEDCL's request of additional power and using that additional power of 97 MW, restored the capacity of APML from 343 MW to 440 MW. With such additional 97 MW, total power



to be procured should have become 1187 MW (1090 + 97). However, in para 19 of the judgment, APTEL directed other respondents i.e. SWPGL and RPL to support request of MSEDCL for procurement of additional power of 97 MW before the Commission. This para 19 of the APTEL judgment suggests that total quantum of power to be procured is still 1090 MW and it will become 1187 MW once the Commission approves MSEDCL's request for procurement of additional power of 97 MW.

- 15.4. In present proceeding, nowhere has MSEDCL requested for additional procurement of 97 MW. The Commission fails to understand the reason behind this action. In the opinion of the Commission this approach of the MSEDCL i.e. filing submission before APTEL that it requires additional power procurement of 97 MW without first approaching the Commission for such additional procurement and further even after directions of APTEL (para 19 of the Judgment) not requesting for the same at least in this petition, is not desirable from the utility like MSEDCL. MSEDCL needs to be consistent in its approach and cannot take two different stands before the two fora. Their demand supply situation cannot change so frequently.
- 15.5. In present proceeding also, as MSEDCL has not requested for additional procurement of 97 MW as was committed before APTEL and accordingly ordered by APTEL, and wants the total quantum of power to be procured limited to 1090 MW. APTEL has already ruled that APML's capacity would be 440 MW. Hence, balance capacity is to be distributed amongst RPL and SWPGL as 440 MW and 210 MW, respectively.
- 15.6. However, the Commission notes that the APTEL has passed an Order dated 11 March 2020 by relying on the affidavit of MSEDCL about 97 MW being an additional requirement of Power. Thus, the Commission is not inclined to accept the contrary submissions of MSEDCL in this petition. Further in light of the observations of the APTEL about SWPGL and RPL for supporting the approval of additional 97 MW the submissions of MSEDCL about limiting the procurement to 1090 MW is not tenable. However as directed by APTEL, MSEDCL needs to approach this Commission justifying their additional requirement. Till such time, the Commission is forced to allocate the total capacity limited to 1090 MW.
- 15.7. The Commission advises MSEDCL that when they approach MERC for additional requirement/procurement of 97 MW (as per their affidavit in the APTEL) as is required as per the provisions and is also mandated by APTEL, apart from justifying the additional requirement of 97 MW, they may consider the other prevailing aspects including the status of various projects approved under Section 62 and Section 63 of the Electricity Act, 2003. They are also advised to factor in the plans pertaining to the procurement of RE power in line with the RPO requirements. After considering all the related factors (demand growth) including the factors mentioned above. MSEDCL is directed to submit the Additional requirement within a period of 6 months from the date of this order.

15.8. The Commission notes that the initialed PPA mentions the contract for 210 MW. As mentioned in the para 12 above, in normal situation, there cannot be any other reference/document other than the initialed PPA which needs to be submitted to the Commission. However, considering the issues and the various orders involved in the long drawn multiple litigations, the initialed PPA was accompanied by a letter covering the difference of opinion between the two parties. SWPGL has requested for alternative relief of allowing at least 240 MW till RPL commences its power supply. The Commission, had considered similar relief to APML in its Order dated 19 January 2019 when it ordered reduction of PPA capacity from 440 MW to 343 MW. APML was allowed to continue with 440 MW capacity till power supply from SWPGL and RPL commences. On similar principle, the Commission deems it fit to allow SWPGL to have contracted capacity of 240 MW till RPL commences its power supply.

15.9. Accordingly, the Commission rules that Contracted capacity for PPA with SWPGL should be 240 MW with condition that it will be reduced to 210 MW once RPL commences its power supply and/or additional requirement of 97 MW does not get approved.

15.10. Further, once MSEDCL approaches the Commission for procurement of additional 97 MW with a detailed justification and depending on the decision of the Commission in that case, the power procurement from SWPGL and RPL could be restored to 240 MW and 507 MW, respectively.

**16. Issue c: What tariff should be applicable to 1<sup>st</sup> year and what should be tenure of PPA?**

16.1. MSEDCL has contended that this PPA should be comparable with 440 MW operational PPA amongst 1090 MW capacity. As 440 MW PPA has achieved CoD in FY 2016-17 and FY 2020-21 would be its 5<sup>th</sup> year of PPA, SWPGL PPA's 1<sup>st</sup> year tariff which would be FY 2020-21, should be 5<sup>th</sup> year tariff stipulated in 25 year tariff stream. Accordingly, PPA tenure should be restricted to 22 years with provision to extend further with mutual consent of parties. In support of its proposal, MSEDCL submitted that 25 year tariff stream is applicable for new project. SWPGL's plant has already been commissioned and it would have recovered a part of capital cost by running the plant in these years.

16.2. SWPGL has opposed such proposal of MSEDCL and stated that levelized rate Rs. 3.28 per unit would not remain so if tariff is not made applicable from 1<sup>st</sup> year for 25 year PPA tenure. It stated that it has kept contracted capacity available for MSEDCL through out these years. In case, 5<sup>th</sup> year tariff is applicable for 1<sup>st</sup> year of PPA, then it should get fixed charges for first four years considering deemed generation. It has also stated that under Section 63 bidding, one cannot go into costing and revenue of projects to validate whether it is earning profit or loss.

16.3. In this regard, the Commission notes that as stated in para 14.3 above, levelized rate of Rs. 3.28 per unit for 1090 MW capacity has attained finality. Further, the Commission in

its Order dated 19 January 2019 has ruled that 25 year tariff stream shall be used for signing of PPA as follows:

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

16.4. The Commission notes that levelized rate of Rs. 3.280 per unit discovered through competitive bidding in the year 2009 was based on competitive bidding guidelines dated 27 March 2009. Said guidelines includes Standard Bidding Documents i.e. RFP and PPA. Clause 3.4 of the standard RFP deals with evaluation of bids which includes provision of computing levelized tariff. Relevant provisions are reproduced below:

*“3.4.3 The Bidders shall quote the different components of Tariff as specified in Format Error! Reference source not found. Based on the Quoted Tariff provided by the Bidders, the Levelized Tariff shall be calculated for the term of the PPA as per the methodology mentioned below.*

*3.4.4 For the purpose of comparison of Financial Bids, the escalable components of Quoted Tariff of each Bidder shall be uniformly escalated as per the relevant inflation / escalation rates mentioned below. For the actual Tariff payment, such factors shall be applied as per the provisions of the PPA.*

.....  
*3.4.7 Transmission Loss*

*The escalated Quoted Tariffs (Rs./kWh) of each of the Bidders for each year of the term of the PPA, calculated as per provisions of Clause 0 and after adding applicable escalated transmission charges, shall then be adjusted for the applicable transmission losses in the following manner:*

.....  
*3.4.8 Computing Levelized Tariff*

*The adjusted escalated Quoted Tariffs (Rs./kWh) as calculated in Clause 0 above for each Bidder for the term of PPA, shall then be discounted upto the Scheduled Delivery Date mentioned in Clause Error! Reference source not found., by applying the discount factors (based on the Discount Rate as mentioned in Clause 0 above) and such aggregate discounted value for the term of the PPA shall be divided by the sum of such discount factors so as to calculate the Levelized Tariff of each Bidder. ....”*

Thus, RFP expects bidders to quote different component of tariff in prescribed format which requires bidders to quote tariff for each year of 25 years PPA. But for evaluation of bids, said quoted tariff stream of each bidders is converted into single levelized number. While computing such levelized tariff, quoted tariff for each year of PPA tenure is discounted by applying discount factor. Therefore, each year’s quoted tariff plays vital role in determining levelized tariff for the bid.

16.5. Now, as proposed by MSEDCL if 5<sup>th</sup> year quoted tariff is used as 1<sup>st</sup> year tariff for SWPGL then levelized tariff would be different from Rs. 3.28 per unit as contribution of first four years would not be counted into levelized number. As levelized tariff of Rs.

3.280 per unit has attained finality; the Commission cannot allow deviation from the same.

- 16.6. Further as stated in para 13 above, the Commission has limited power under Section 63 of the EA, 2003 i.e. either adopt or reject the tariff adoption. Allowing, 5<sup>th</sup> year quoted tariff to be made applicable to 1<sup>st</sup> year of commissioning of the project would lead to changing conditions of the RFP/PPA post completion of bidding process, which cannot be allowed by the Commission under Section 63 of the EA, 2003.
- 16.7. As far as MSEDCL's contention that SWPGL would have earned revenue from selling power from these capacities during pendency of these litigations is concerned, the same is beyond the scope of Commission's power under Section 63 of the EA, 2003. Unlike Section 62 projects where the Commission can undertake scrutiny of each head of expenses and revenue, competitively bided project under Section 63 of the EA, 2003 does not requires to disclose all these details for scrutiny.
- 16.8. In view of the above analysis, the Commission rules that 1<sup>st</sup> year's quoted tariff as per 25 years tariff stream of 1200 MW PPA of APML (same has been used for 440 MW PPA of APML) shall be 1<sup>st</sup> year tariff of SWPGL post SCoD as per the PPA. Similarly, tenure of the PPA shall be 25 years from SCoD so as to maintain levelized rate of Rs. 3.280 per unit.
- 16.9. Having ruled as above, the Commission would like to point out following provision of initialed PPA which mandates SWPGL to maintain contracted capacity for utilization of MSEDCL throughout PPA tenure:

*“4.2 Seller's Obligations*

*4.2.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:*

*.....*

*b) the commencement of supply of power, up to the Aggregated Contracted capacity, to the Procurer no later than the Scheduled Delivery Date or the Revised Scheduled Delivery Date(s), as the case may be, such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirement throughout the Term of this Agreement;”*

As SWPGL's plants have been commissioned earlier, it should ensure the plant is able to generate and honour this PPA for a period of 25 years. All the necessary steps (if any) with regards to useful life of the plant and generation beyond useful life shall be governed by the provisions/stipulations in this regards and thus the tenure of 25 years is at its cost and risk.

- 16.10. The Commission also notes that while filing this Petition, both parties have agreed for commencement of supply from 1 June 2020. SWGPL in its submission has stated that as

the said date has lapsed, power supply can commence immediately after approval of the PPA by the Commission. MSEDCL in its submission has mentioned that as per provisions of PPA, Schedule CoD is 4 years from date of PPA, however it had agreed for early scheduling of power from 1 June 2020. Now, as said date has been lapsed, both parties shall once again agree upon a date for commencement of supply as per clause 3.3.1 of the PPA and stipulate such date in the final PPA.

16.11. As issue of 1<sup>st</sup> year tariff and tenure of PPA have been decided in terms of above ruling, the Commission is not going into claim of both parties that Supreme Court judgment in Karantaka Rare earth, on the principle of law that acts of court cannot prejudice any person.

**17. Issue d: Whether identification of Units from power plant mandatory under the PPA?**

17.1. MSEDCL has proposed to identify Units from the SWPGL's Maharashtra plant which will be supplying power under the PPA. MSEDCL has stated that such identification of Units was done under the 1320 MW PPA with APML and 300 MW PPA with JSW Energy. It has also claimed that identification of Units helps in proper energy accounting, settlement of Change in Law claims, scheduling flexibility etc.

17.2. SWPGL has opposed such proposal on the ground that bidding documents did not require to do so. Further, other PPAs of MSEDCL does not have identified Units of the power plant. Contradicting MSEDCL's submission, SWPGL has claimed that instead of identified units, considering power station as a whole will be more beneficial to MSEDCL and there would not be any accounting difficulties as all Units of the power station are of same capacity with same operational parameters.

17.3. The Commission has verified PPAs of Emco Energy (200 MW), RPL-Amravati (1200 MW) and APML (1200 MW) which was signed based on 2000 MW bidding process concluded in 2012. In all these PPAs, Units of the Power Plants have not been identified against contracted capacity and instead contracted capacity is against power station as whole. MSEDCL's has referred 1320 MW PPA with APML and 300 MW PPA with JSW Energy which have identified Units. The Commission notes that these PPAs were based on earlier bidding process where different bidding documents was used. Hence, same cannot be used in the present case.

17.4. As none of the PPAs signed subsequent to 2000 MW bidding process concluded in year 2012 have any clause for identifying Units of the Power Station under the PPA, SWPGL's cannot be forced to identify Units as its PPA is based on the same document.

17.5. Hence, the Commission rules that MSEDCL cannot force SWPGL to identify Units of Power Plant for the purpose of PPA.

17.6. At the same time, the Commission also notes that SWPGL in its submission has suggested alternative measure wherein Units can be identified but not in the way

MSEDCL has included in the PPA. If both parties can mutually agree upon the same, then with mutual consent, identified Units can be included in the PPA.

**18. Issue e: Other understanding between the parties**

18.1. MSEDCL has contended that SWGPL vide its letter dated 21 May 2015 has agreed that it will not claim compensatory tariff on account fuel shortfall. In this regard, the Commission has noted that in said letter, SWGPL has stated as follows:

*“We have in principle agreed to match the levellised tariff of Rs 3.28/kWh as finalized and willing to provide an undertaking that no compensatory tariff as per NCDP will be claimed, subject to an with a clear understanding that it is pari passu amongst the supplier and such stipulation is uniformly applied to all suppliers to MSEDCL”*

18.2. As seen from the above, SWGPL undertaking was conditional and cannot be treated to mean that it has waived its right of seeking compensation for short fall of coal, if found applicable. Further, in its letter dated 11 March 2020, SWGPL has stated that the said undertaking was relating to compensatory tariff which has been set aside by APTEL/Supreme Court and hence has becomes infructuous.

18.3. The Commission also notes that vide its letter dated 24 February 2020, SWGPL has offered additional discount of 1% over and above what is envisaged in the PPA for any payment made on or before due date, subject to a maximum of Rs. 40 lakhs per month. SWGPL has offered this additional discount on account of financial crunch and to have early payment to sane working capital requirement. In the opinion of the Commission, since both parties have agreed on such additional discount, the same could be included in the PPA.

19. With changes approved in earlier part of this Order, MSEDCL shall enter into PPA with SWPGL for supply of power from its Maharashtra generating plant and submit signed copy of the PPA to the Office of the Commission for record purpose.

20. Hence, following Order:

**ORDER**


- 1. Case No 91 of 2020 is partly allowed.**
- 2. Power Purchase Agreement between Maharashtra State Electricity Distribution Co. Ltd and Sai Wardha Power Generation Co. Ltd is approved with following modification:**
  - a. Contracted capacity should be 240 MW with condition that it shall stand reduced to 210 MW once RattanIndia Power Ltd commences its power supply or will not**

be so reduced if MSEDCL gets due approval for additional procurement of 97 MW of power.

- b. 1<sup>st</sup> year's quoted tariff as per 25 years tariff stream of 1200 MW PPA of Adani Power Maharashtra Ltd shall be the 1<sup>st</sup> year tariff post Scheduled Commercial Operation Date as per the PPA.
  - c. Tenure of the PPA shall be 25 years from Scheduled Commercial Operation Date.
  - d. Units of the Power Plant need not be identified under the PPA for Contracted capacity.
3. Maharashtra State Electricity Distribution Co. Ltd shall file a signed copy of the PPA for records of the Commission.

Sd/-  
(Mukesh Khullar)  
Member

Sd/-  
(I.M. Bohari)  
Member

  
(Abhijit Deshpande)  
Secretary

