

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 68 of 2023**

**Petition of Maharashtra Vidyut Nigam Private Limited for payment of Late Payment Surcharge (LPS) on energy bills paid belatedly by MSEDCL after the due date.**

M/s. Maharashtra Vidyut Nigam Private Limited (MVNPL)... Petitioner  
Maharashtra State Electricity Distribution Company Limited (MSEDCL)... Respondent

**Case No. 69 of 2023**

**Petition of Vayunandana Power Limited requesting the Commission to issue necessary directions to MSEDCL to the terms and conditions of Article 15.02 of the Energy Purchase Agreement dated 22 September 2008**

M/s. Vayunandana Power Limited (VPL)... Petitioner  
Maharashtra State Electricity Distribution Company Limited (MSEDCL)... Respondent

**Case No. 70 of 2023**

**Petition of Greta Energy Limited seeking direction to MSEDCL for payment of Late Payment Surcharge (LPS) on energy bills paid belatedly by MSEDCL after the due date.**

M/s. Greta Energy Limited (GEL)... Petitioner  
Maharashtra State Electricity Distribution Company Limited (MSEDCL)... Respondent

**&**

**Case No. 71 of 2023**

**Petition of AA Energy Limited seeking direction to MSEDCL for payment of Late Payment Surcharge (LPS) on energy bills paid belatedly by MSEDCL after the due date.**

M/s. AA Energy Limited (AAEL)... Petitioner

Maharashtra State Electricity Distribution Company Limited (MSEDCL)... Respondent

**Coram**

**Sanjay Kumar, Chairperson  
Anand M. Limaye, Member  
Surendra. J. Biyani, Member**

**Appearance:**

For the Petitioners : Mr. Ashish Singh (Adv.)  
For the Respondent : Mr. Rahul Sinha (Adv.)

**ORDER**

**Date: 28 December 2023**

1. Petitioners have filed the present Petition on 20 March 2023 seeking payment of Late Payment Surcharge (LPS) on belated payments of energy bills. For sufficing the claim Petitioner MVNPL relied upon Regulation 20.1 of MERC (Terms and Conditions for determination of RE Tariff) Regulations, 2010 (RE Tariff Regulations, 2010). The Petitioners GEL and AAEL have referred to Regulation 21 of MERC (Terms and Conditions for determination of RE Tariff) Regulations, 2015 (RE Tariff Regulations, 2015). The Commission notes that VPL has referred to Article 15.02 of the Energy Purchase Agreement (EPA). Considering similar nature of relief sought and arguments on record, the Commission decided to club the matters and pass a common Order.
2. **Main prayers are as follows:**

**Case No.68 of 2023:**

“

- a) Direct MSEDCL to pay the Late Payment Surcharge (“LPS”) (As per Annexure- C) in accordance with Regulation 20.1 of the MERC (Terms and Conditions for determination of RE Tariff) Regulations, 2010.
- b) Hold and declare in accordance with the Hon’ble Commission’s earlier rulings, that MSEDCL is liable to pay an interest @ 1.25% per month on the Late Payment Surcharge (“LPS”) till final payment is made;
- c) Pass such further orders as this Hon’ble Commission deems fit and proper in the interest of justice and good conscience.”

Similar prayers have been made by the Petitioners in Case No.69 of 2023, 70 of 2023, and 71 of 2023. Only difference is with reference to applicable Regulations/provisions of EPA. For sake of brevity, prayers made by all the Petitioners have not been captured.

### 3. Petitioners in its Case has stated as follows:

3.1. The present Petition is being filed by MVNPL, VPL, GEL and AAEL seeking directions against MSEDCL for payment of outstanding Late Payment Surcharge (LPS) / Delayed Payment Charges (DPC).

3.2. MVNPL, VPL, GEL and AAEL are operating following installed capacity:

Sr.No.	Generators	EPA Date	Installed Capacity	Area
1	MVNPL	30.12.2014	10 MW	At Plot No. C-1, MIDC Deoli, District- Wardha- 442101.
2	VPL	22.09.2008	10 MW	At S. No. 262, 263 & 269, Village Kaneri, Taluka-Gadchiroli.
3	GEL	07.03.2018	7 MW	At Plot No. 28, Mul Growth Centre, MIDC Mul, District-Chandrapur
4	AAEL	19.09.2017	10 MW	At Wadsa, Sesaiganj, District-Gadchiroli.

3.3. The Petitioners have been regularly generating and sending invoices for the power generated and supplied to MSEDCL as per the terms and conditions of EPA. However, there has always been a delay on part of MSEDCL in making legitimate payments.

3.4. In Case of MVNPL, GEL and AAEL, provisions of MERC RE Tariff Regulations, 2010/2015 are applicable. It is pertinent to note that the EPA has been entered between the Parties in accordance with the MERC RE Tariff Regulations, 2010/2015. As per Regulations, LPS is payable on bills which are paid after their due date i.e. after 60 days from bills being raised.

In Case of VPL as per EPA provisions, LPS is applicable on bills which are paid after their due date i.e. after 45 days from raising of the bills.

3.5. The Petitioners made correspondence with MSEDCL and called upon to pay the LPS on the bills which were paid by it belatedly i.e. after the due date. Even after repeated reminders and request, MSEDCL has failed to pay the LPS.

3.6. Payment Liability worked out by the Petitioners is as below:

Sr. No	Generators	Date	Interest @ 1.25% Per month on amount realized against bill	LPS in (Rs. Crores)
1	MVNPL	Apr17- July 22	1.25 %	1.33
2	VPL	Apr-18 –Feb 23		1.70
3	GEL	Apr-18 –Sep 22		1.35
4	AAEL	Apr-18 – Aug 22		0.95

3.7. EPAs between MVNPL, GEL & AAEL with MSEDCL which has been executed in accordance with the MERC RE Tariff Regulations, 2010/2015 has identical clauses w.r.t due dates/timelines for payments of invoices/bills i.e. due date for payment being after 60 days from bills being raised. However, for reasons best known to MSEDCL, it has chosen not to incorporate the provision of LPS in the EPA.

3.8. The reference has been made to the Commission's Order dated 13 October 2021 in Case No. 75 of 2021, in which the Commission has ruled that short term EPA/PPAs which are being signed post expiry of generic tariff based long term EPAs should include provisions of DPC /LPS and accordingly allowed levy of DPC/LPS even though no such specific clause is mentioned in the short-term EPA/PPA. The dispensation provided in referred Order is squarely applicable in present cases.

3.9. Article 20.1 (in case of MVNPL)/18.1 (in case of GEL and AAEL) of EPA categorically stipulates the rights and duties of the parties shall be governed by RE Tariff Regulations, 2010/2015. There cannot be any deviation in the EPA from what has been specifically provided under the MERC RE Tariff Regulations, 2010/2015.

3.10. MSEDCL has not disputed the liability towards LPS, hence MSEDCL cannot escape its liability by citing alleged difficult cash flow situation arising out of regulatory issues in its ARR or otherwise. It is the responsibility of MSEDCL to arrange funds and to make timely payments to the generators based on binding Regulations of the Commission.

3.11. It is settled proposition of law that once Regulations govern the field then the matter ceases

to be contractual. Hence, MSEDCL is bound to pay the LPS in accordance with the RE Tariff Regulations, 2010/2015. The LPS is part of tariff and regulatory in nature – not a matter for the parties to EPA (generator and procurer) to negotiate and provide in or control by contractual terms. LPS being essentially one for enforcement of Regulations and, therefore, regulatory in nature and consequently beyond the pale of limitation bar.

- 3.12. The Petitioners have relied on the Commission's Order dated 15 June 2018 in Case of 102 of 2018 in which it has directed MSEDCL to pay the (i) Principal amount(ii) LPS/DPC amount and (iii) Penal Interest @ 1.25% per month on the outstanding DPC/LPS. Considering the same, Petitioners prayed to compensated them with penal interest @ 1.25% per month on the outstanding LPS amount.

**4. MSEDCL in its submissions dated 15 September 2023 stated as follows:**

Similar submission has been made by the MSEDCL in Case No. 68 of 2023, Case No.69 of 2023, Case No.70 of 2023, and Case No.71 of 2023 and hence summarised together as follows:

- 4.1. MSEDCL raised the objection as to the maintainability of the present Petitions. Present Petitions have been field invoking Regulation 20/21 of MERC RE Tariff Regulations 2010/2015, Section 86(1)(e) of the Electricity Act, 2003 read with Regulation 39 of the MERC (Transaction of Business and Fees and Charges) Regulations, 2022 seeking directions to MSEDCL for payment of LPS in terms of EPA. The reliefs sought by the Petitioners does not fall within the ambit of the Sections under which the present Petition has been filed.
- 4.2. The Regulation 20/21 of MERC RE Tariff Regulation 2010/2015 only speaks of the LPS and Regulation 39 speaks of the inherent powers of the Commission which can used by the Commission in exceptional cases. However, the Petitioners has not pleaded anything to show as to why the Commission must exercise this power under exceptional circumstances. The bare perusal of Section and Regulations mentioned herein clearly suggest that these are the powers vested with the Commission to aid/facilitate them while adjudicating a dispute between the parties. The referred Section and Regulations cannot be the basis on which a Petition could be moved before the Commission seeking recovery of money which can be adjudicated by the Commission under Section 86 (1) (f) of the Electricity Act, 2003.
- 4.3. The Petitioners are specifically asking for LPS in terms of the EPA entered between the parties in terms of the RE Tariff Regulation 2010/2015. However, the EPAs which was entered between the parties subsequently and the Petitioners though being fully aware of the existence of Regulation 20/21 of RE Tariff Regulation 2010/2015, voluntarily chose not to include the LPS payment terms within the said EPA, which amounts to waiver i.e. waiving of right to have the benefit of LPS through a contract. Accordingly, today the Petitioners cannot fall back

upon the said Regulation, after a delay of 9 years from the date of EPA.

- 4.4. It is a settled position of law that the Courts cannot rewrite a contract which was mutually executed by the parties to the Contract rather the Courts have to simply apply the terms and conditions of the agreement as agreed between the parties. MSEDCL relied on judgement of Supreme Court of India in *Maharashtra Electricity Distribution Company Ltd Vs Maharashtra ERC, 2021 SSC online 913* stated that the provisions of PPA which has been mutually and consciously agreed by parties are binding between the parties.
- 4.5. MSEDCL has also referred Supreme Court Judgement in the matter of *Shri Ambica Medial stores and others v Surat people's Cooperative Bank Ltd and Others (2020) 13 SSC 564* in which Court or forum cannot go beyond what has been between the parties. It is mandate under law that any court has to simply apply the terms and conditions of the agreement as agreed between parties.
- 4.6. The Petitioners are raising the claim for the first time by way of the present Petitions. The present claims of the Petitioners are barred by the *Doctrine of Delay and laches*. The Doctrine of Laches emanates from the principle that the Courts will not help people who sleep over their rights and helps only those who are aware and vigilant about their rights. The following elements must be satisfied to consider this doctrine to bar the Petitioners from the cause of action:
- Delay must be unreasonable at the time of bringing the matter;
  - Negligence in asserting a claim or right;
  - Knowledge of a claim by the Petitioners in advance.
- 4.7. MSEDCL asserted that there has been an inordinate delay in presenting the present case/claim in hand as the EPA was executed on 30 December 2014 where there was no provision made applicable for DPC/LPS. However, present Petitions have been filed on 20 March 2023 and thus, fall within the principle of unreasonable delay.
- 4.8. Further, the Petitioners approached the Commission at this belated stage when they were aggrieved by the non-providing of DPC/LPS on 30 December 2014 when PPA was executed which shows negligence in asserting a claim or right.
- 4.9. The Petitioners admitted that they were aware of their right to have LPS against the delayed payment in terms of Regulations 20/21 of MERC RE Tariff Regulations, 2010/2015 since signing of EPA but chosen to raise a grievance against the same only on 20 March 2023 by way of the present Petitions.
- 4.10. Hon'ble Supreme Court in catena of Judgments have clearly laid down that those person who

did not challenge the wrongful action in their Cases and work up long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, such person cannot claim that the benefit of the Judgement rendered in cases of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim. The present cases also fall under the same category as the Petitioners have been sitting on the fence all these years and approached the Commission only once the said Order have been passed by the Commission. Further, all the Orders/Judgements which has been relied upon by the Petitioners are passed in a complete different set of facts and were in *personam* and not in *Rem.*

- 4.11. MSEDCL has referred Judgment dated 16 October 2015 in the matter of *Ardhra Pradesh Power Coordination Committee and others v Lanco Kondapalli Power Ltd and Other*. In said Judgement it has been categorially stated that principles underlying the Limitation Act, 1963 are applicable to State Commissions when it functions as Statutory adjudicatory quasi-judicial /judicial authority in determining all claims or disputes, including those arising out of contract between licenses and generating companies. Hence, wherever any claim/dispute is raised before the Commission under Section 86(1)(f) then Limitation Act strictly applies, and any claim barred by limitation i.e. a period of (3) years cannot be adjudicated unless the principles underlying Section 5 and Section 14 of the limitation Act 1963 are satisfied.
- 4.12. It is a settled position of law that mere representation or correspondence does not extend the period of limitation it is only the filing and /or commencing a legal proceeding that stops the period of limitation from running. The reference is made to Paragraphs 15 and 18 of *State of Tripura v. Arabinda Chakraborty reported in (2014) 6 SCC 460* and Paragraph 51 and 52 of *Allahabad Development Authority and Another Vs. M/s. Vidyawati Construction Company reported 2001 SCC Online All.*
- 4.13. It is also a settled position of law that the cause of action for each claim is separate and distinct. Part- payments extend the period of limitation only regarding the bill or subsisting claim for which payment is made and not for other claims. It is noteworthy that in the present matter there is no such case which has been made out by the Petitioners.
- 4.14. In this Case the maxim "*Vigilantibus, non dormientibus, jura subveniunt*" (the law assists those who are vigilant, not those who sleep over their rights) clearly applies to the present case. This legal maxim refers to the legal diligence on part of the claimant, which in the present case is specifically not done and, on this ground, alone the claims of the Petitioners ought to be rejected.

**5. Petitioner's Notes of arguments circulated on 21 September 2023 stated as follows:**

- 5.1. Period of limitation only applies to proceedings filed under Section 86 (1) (f) of the Electricity Act, 2003. The preset proceedings were filed only under Section 86 (1) (e) of the Electricity Act, 2003 seeking directions for payment of DPC/LPS in line with the Commission's RE Tariff Regulations, 2010/2015. Hence limitation is inapplicable to the present proceedings.
- 5.2. No part of the claim herein is barred by limitation as the present Petitions have been filed invoking the regulatory powers of the Commission seeking enforcement of the MERC RE Tariff Regulations, 2010/2015. There is no contractual dispute between parties leading to any claim for recovery. Hence limitation, if any, is inapplicable to the present proceedings. Petitioners also referred the Hon'ble APTEL Judgment dated 02 November 2020 in Appeal No. 10 of 2020 wherein it held that LPS being essentially one for enforcement of Regulations and regulatory in nature and consequently beyond the pale of limitation bar.
- 5.3. The Petitioners also referred to Supreme Court Judgment in 10 January 2022 in Suo Moto Writ Petition (c) No. 03/2020. In said matter Hon'ble Court ruled that the period between 15 March 2020 to 28 February 2022 has to be excluded while counting the period of limitation.
- 5.4. Therefore, in the present case, the Petitioners, in order to claim LPS/DPC amounts for the period May 2018 should have filed the Petition by April 2021. However, the period between 15 March 2020 to 28 February 2022 is already excluded from limitation. Hence, for the present Petition, the period between 15 March 2020 to May 2021 leads to a period of 1 year and 0.5 months available to the Petitioners to file claims for the month of April 2018 which needs to be counted from 01 March 2022. The Petition was filed by the Petitioner on 20 March 2023 and hence, no claim in the Petition is barred by limitation.
6. During e-hearing held on 22 September 2023, the advocate appearing on behalf the Petitioners and MSEDCL reiterated their submissions.
7. MSEDCL filed its Notes of arguments on 12 October 2023. Repetitive arguments are not captured for sake of brevity. MSEDCL raised following additional arguments in respect of Case No.69 of 2023:
  - 7.1. At Article 15.2 of EPA, the applicable rate of LPS has been stipulated. As per Article 15.2 EPA the project holder is entitled to interest on delayed payment at the rate of 2% above SBI short term lending rates.
  - 7.2. Reserve Bank of India vide its notification dated 17 March 2023 replaced short term lending rates with Marginal Cost of Funds based Lending Rates (MCLR).
  - 7.3. VPL referred to the Commission's Order dated 17 March 2023 in Case No.66 of 2022, wherein the Commission used one-year SBI MCLR plus 2%. Due to above there is a



difference between the LPS calculated by VPL and MSEDCL. As per MSEDCL for the period March 2020 to November 2022, LPS amount works out to be Rs.56,41,177/- only.

- 7.4. Further, as per the Commission’s Tariff Order in Case No. 1/SM/2022 dated 29 July 2022 variable charges for FY 2020-21 to FY 2022-23 were determined. The difference between provisional tariff levied till date and determined tariff was to be adjusted in subsequent bills.
- 7.5. Thereafter a Review Petition was filed by the Biomass generators before the Commission being Case No. 181 of 2022, wherein the Commission vide its Order dated 13 February 2023 revised the variable charges as under:

<b>Year</b>	<b>As per Order in Case No. 1/SM/2022 dated 29 July 2022</b>	<b>As per Order in Case No. 181 of 2022 dated 13 February 2023</b>
FY 2020-2021	Rs. 4.90/kWh	Rs.5.11/kWh
FY 2021-2022	Rs. 5.15/kWh	Rs.5.37/kWh
FY2022-2023	Rs. 5.40/kWh	Rs.5.64/kWh

- 7.6. However, while making actual payments to Biomass generators earlier, a higher variable Charge was applied, the details of which are as under:

<b>Year</b>	<b>Variable Charges per unit</b>
FY 2020-2021	Rs 5.55
FY 2021-2022	Rs 5.55
FY2022-2023	Rs 5.55

- 7.7. Hence, an excess payment was made to all the similarly situated generators in the FY 2020-2021 and 2021-2022. Further, in terms of the Commission’s Order, variable cost was reconciled and adjusted in six equal instalments without any carrying cost.
- 7.8. In view of the above, invoice amount for LPS Calculation is considered as per above observations made in Tariff Order.

### **Commission’s Analysis and Rulings**

8. The Petitioners have filed the present Petition under 86 (1) (e) of Electricity Act 2003 read with Regulation 39 of the MERC (Transaction of Fees and Charges) Regulation 2022. The Petitioners are seeking payment of LPS on energy bills paid belatedly by MSEDCL.
9. The Commission notes that the EPAs executed with MVNPL, GEL and AAEL do not contain provision of LPS. The said EPAs have been executed during control periods governed by MERC

RE Tariff Regulations, 2010 and 2015. The Regulations 2010/2015 do provide for payment of LPS upon payment default. The Petitioners averred that once Regulations governs field then the matter ceases to be contractual. Hence, MSEDCL is bound to pay the LPS in accordance with governing regulatory framework. It is also observed that in case of VPL, EPA do contain the provision of LPS @ 2% above SBI short term lending rate. Details of EPAs referred in this Petition and different RE Tariff Regimes are as below:

Sr.No.	Generators	EPA Date	Applicable Regulations/Order	LPS provision in Regulations/Order
1	MVNPL	30.12.2014	MERC RE Tariff Regulations, 2010	@ 1.25% per month
2	VPL	22.09.2008	Biomass Order in Case No.37 of 2003	@2% above SBI Short term lending rate
3	GEL	07.03.2018	MERC RE Tariff Regulations, 2015	@1.25% per month
4	AAEL	19.09.2017		

10. MSEDCL has submitted that provisions incorporated in EPAs are with mutual consent. Hence, now Court can't rewrite the same.

11. Based on documents on record, the Commission frames following issues for its consideration:

- a) Whether Petitioners are eligible for LPS in absence of explicit provision in EPA?
- b) If yes, whether the claims made by the Petitioners are barred by the law of limitation?
- c) If applicable, quantification of claim amount?

The Commission is dealing with the above issues in the following paragraphs:

**12. Issue (A): Whether Petitioners are eligible for LPS in absence of explicit provision in EPA?**

12.1. The Petitioners MVNPL, GEL & AAEL submitted that their EPAs with MSEDCL have been executed in accordance with the MERC RE Tariff Regulations, 2010/2015. EPAs do contain identical clauses w.r.t due dates/timelines for payments of invoices/bills. Due date for payment is after 60 days from bill date. However, provision of LPS is not incorporated in EPAs. MVNPL, GEL & AAEL contended that regulatory framework governs the modalities of power sell and EPA. EPA executed between parties cannot override the binding terms of MERC RE Tariff Regulations, 2010/2015. There cannot be any deviation in the EPA from what has been specifically provided under the MERC RE Tariff Regulations, 2010/2015. The Petitioners also referred to the Commission's Order dated 13 October 2021 in Case No. 75 of 2021. In said Order the Commission ruled that short term EPA/PPAs which are being signed post expiry of generic tariff based long term EPAs should include provisions of DPC /LPS and accordingly allowed levy of DPC/LPS even though no such specific clause is mentioned in the Short-Term EPA/PPA.

- 12.2. MSEDCL argued that the Petitioners are raising the claim for the first time by way of the present Petitions which is barred by the *Doctrine of Delay and Latches*. The Petitioners have not been vigilant about their rights. Further, it is a settled position of law that the Courts cannot rewrite a contract which was mutually executed by the parties. Petitioners have voluntarily chosen not to include the LPS payment terms within the said EPA, which amounts to waiver i.e. waiving of right to have the benefit of LPS through a contract.
- 12.3. The Commission noted that EPA executed by MVNPL, GEL & AAEL does not contain provision with respect to LPS payment.

In RE Tariff Regulations, 2010, LPS provision reads as below:

“

**20. Late Payment Surcharge**

*20.1 In case the payment of any bill for charges payable under these Regulations is delayed beyond a period of 60 (sixty) days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company.”*

Similar provision has been made in RE Tariff Regulations, 2015 at Regulation 21.

- 12.4. It is pertinent to note that present case is peculiar in nature wherein Regulatory framework provides for certain dispensation (on LPS applicability), but the contract signed between the parties is silent on said aspect. In this regard, it is necessary to understand that RE Tariff Regulations, 2010/2015 are governing frameworks for procurement of RE power. Further, EPA provides for Article related to Governing Law (for reference quoted from EPA between MVNPL and MSEDCL), which reads as below:

“

**20.1 Governing Law**

*This agreement and the rights and duties of the parties hereunder shall be governed by and construct enforced and performed in accordance with the laws of India, Electricity Act 2003, **RE Tariff Regulations 2010**, MERC Suo Moto Order dated 07.07.2014 and relevant orders of MERC issued from time to time.”*

Similar stipulations are provided in EPAs of GEL and AAEL with MSEDCL, by making reference to RE tariff Regulations 2015. The above stipulations clearly cover the Regulatory regime.

- 12.5. Further, it is highlighted that the Hon’ble Appellate Tribunal in the matter of *M/s Fortune Five Hydel Projects Pvt. Ltd. Vs. Karnataka Regulatory Commission* (Appeal No. 42 of 2018 & I. A. No. 214 of 2018, along with 18 appeals, dated 29.03.2019), has held as follows:

“

**6.14 The existing contracts can only be modified by a regulation to that effect, and not by mere order of the state commission.** In Hon'ble Supreme Court of India's decision in PTC Judgment, where Central Electricity Regulatory Commission (“CERC”) had issued regulations affixing trading margins, the Hon'ble Supreme Court of India held that CERC could override existing PPAs only by issuing regulations under Section 178 of the Act, as under:

*“A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).”*

*Accordingly, by drawing a parallel analogy, KERC cannot override existing contracts by an order passed under Section 86.”*

(Emphasis Supplied)

In present Cases, the Regulations provides for applicability of LPS and hence can be enforced even if EPAs do not provide it explicitly.

- 12.6. As far as argument of waiver of rights to claim LPS is concerned, it is necessary to peruse the Article 23.4 of EPA (refer MVNPL and MSEDCL), which reads as below:

“

*23.4 Waiver*

*Failure to enforce any right or obligations by any party with request to any matter arising in connection with this agreement shall not constitute a waiver as to that matter or any other matter. **Any waiver by any party of its rights** with respect to a default under this agreement or **with respect to any other matters arising in connection with this agreement must be in writing.** Such waiver shall not be deemed a waiver with respect to a subsequent default or other matter.”*

MSEDCL has not able to produce any written document showing parties have specifically agreed to waive off LPS claims. Hence, the argument of MSEDCL that LPS is waived off by the Petitioners is unsubstantiated.

- 12.7. Thus, the Commission rules that even though EPA signed by MVNPL, GEL and AAEL with MSEDCL do not have specific provision for payment of LPS on delayed payment of principal amount, as such provision is stipulated in governing RE Tariff Regulations, these Petitioners are eligible for LPS. In case of VPL, EPA already has provision of LPS and Petitioner is entitled to invoke the same.

**13. Issue (B): Whether the claims made by the Petitioners are barred by the law of limitation?**

13.1 The Commission notes that MSEDCL in its submission has not commented on computation of LPS liability of AAEL, GEL and MVNPL. MSEDCL has provided its computation on LPS liability of VPL. As per MSEDCL LPS liability needs to be within Law of Limitation.

13.2 The Petitioners in their submission has emphasised that the present Petition has been filed invoking the Regulatory Powers of the Commission. Hence, Law of Limitation is not applicable.

13.3 The Commission notes that the provisions of the Section 86(1) (f) of the EA 2003 are as follows:

“

*Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -*

*---*

*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;---*”

In the present case, relief sought is LPS amount from MSEDCL for alleged delay in payment of monthly due amount. Although, the Petitions are filed under Section 86 (1) (e) of the Electricity Act, 2003 and Regulation 39 of the MERC (Transaction of Business and Fees and Charges) Regulations, 2022, nature of the issues agitated in the Petitions are in the nature of dispute between the Generating Company (the Petitioners) and Distribution Licensee (MSEDCL).

13.4 The Petitioners have not mentioned Section 86 (1) (f) of the Electricity Act, 2003. Rather it has filed petition mentioning Section 86 (1) (e) of the Electricity Act, 2003. It is pertinent to note that the Hon'ble Supreme Court in its Judgement dated 12 February 2009 in Civil Appeal No. 943-944 (J. Kumaradasan Nair v. Iric Sohan, [(2009) 12 SCC 175]) has ruled as follows:

“

*18. It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. The court will not apply the beneficent provisions like Sections 5 and 14 of the Limitation Act in a pedantic manner. **When the provisions are meant to apply and in fact found to be applicable to the facts and circumstances of a case, in our opinion, there is no reason as to why the court will refuse to apply the same only because a wrong provision has been mentioned. In a case of this nature, sub-section (2) of Section 14 of the Limitation Act per***

*se may not be applicable, but, as indicated hereinbefore, the principles thereof would be applicable for the purpose of condonation of delay in terms of Section 5 thereof.”*  
**[Emphasis added]**

The Hon’ble Supreme Court in the aforesaid Judgment has held that mentioning of a wrong provision or non-mentioning of any provision of law would not be the criteria to decide applicability of the law and jurisdiction of the court. In view of the above judgment of the Supreme Court (though the ruling is in respect of applicability of Limitation Act) and considering nature of reliefs sought in the present Petitions, the Commission is of the opinion that present Petitions needs to be considered as Petitions filed under Section 86 (1) (f) of the Electricity Act, 2003 and accordingly all applicable laws need to be considered while deciding the relief sought.

- 13.5 The Commission notes that Hon’ble Supreme Court vide its Judgment dated 16 October 2015 in the case of *AP Power Co-ordination Committee vs. M/s Lanco Kondapalli Power Ltd.* has held that the provisions of the Limitation Act, 1963 shall be applicable to the State Commission where it executes its judicial powers under Section 86(1)(f) of the Electricity Act-2003. Taking the cues from above Judgement, the Commission deems it fit to apply principles encompassed in Law of Limitation while evaluating the claims statement in present matter.
- 13.6 It is a settled position of law that mere representation or correspondence does not extend the period of limitation, it is only the filing and /or commencing a legal proceeding that stops the period of limitation from running. This principle is underscored in ‘*State of Tripura v. Arabinda Chakraborty reported in (2014) 6 SCC 460*’. Based on above principle, any claim prior to three years from date of filing of Petition is barred by limitation. In present Cases, the Petitions have been filed on 20 March 2023. Accordingly, claim prior to March 2020 should have been barred by limitation.
- 13.7 The Petitioners have relied upon Hon’ble Supreme Court Judgment dated 10 January 2022 and averred that the period between 15 March 2020 till 28 February 2022 needs to be excluded for the purpose of limitation. Relevant part of the said Supreme Court Judgment is reproduced below:
- “I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasijudicial proceedings.*
- II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*

*III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.”*

Thus, in the above Order, the Supreme Court has excluded period from 15 March 2020 till 28 February 2022 for the purpose of limitation in respect of all judicial or quasijudicial proceedings. Consequent to such exclusion, balance period of limitation remaining as on 15 March 2020 (although above order stated that balance period as on 3 October 2021, it needs to be read as 15 March 2020 as Supreme Court vide Order dated 29 September 2021 has ruled that balance period as on 15 March 2020 shall be available from 3 October 2021), if any, shall be available from 1 March 2022. However, in para III above, Supreme Court have further ruled that irrespective of such balance period, if period of limitation would have expired between 15 March 2020 to 28 February 2022, then such persons have limitation period of only 90 days from 1 March 2022 i.e. till 30 May 2022.

13.8 In present Cases, dispute is regarding non-payment of dues. Rights to institute a suit or proceedings triggers after expiry of due date for payment mentioned in the bill invoice. In normal course period of limitation to institute suite or proceeding for such non-payment is three years. Therefore, the limitation period for bill invoices whose due dates fall between 15 March 2017 to 28 February 2019 would have expired between 15 March 2020 to 28 February 2022. However, in view of the above quoted Supreme Court Order, although limitation has expired during above stated period, opportunity have been given to initiate suite or proceeding in extended limitation period i.e. till 30 May 2022. Any suit or proceeding initiated post 30 May 2022 for bill invoice having due date between 15 March 2017 to 28 February 2019 is time barred. In present cases, some of the claims are pertaining to invoices whose due date is between 15 March 2017 to 28 February 2019. As these Petitions have been filed on 20 March 2023 i.e. beyond the extended period of limitation (30 May 2022), all the claims whose due date for payment is prior to 28 February 2019 is barred by law of limitation and hence cannot be allowed.

13.9 Limitation period for invoices whose due date for payment is 1 March 2019 and beyond is not expired between 15 March 2020 to 28 February 2022 and hence in view of above quoted Supreme Court Order, for such invoices, balance period of limitation remaining as on 15 March 2020 shall be available from 1 March 2022. Based on such principles, in prese cases, claims for invoices whose due date for payment is 1 March 2019 or beyond are within the limitation period.

**14. Issue (C): If applicable, quantification of claim amount.**

14.1. The Commission notes that while dealing with non-payment issues, the Hon'ble APTEL in its Judgment dated 6 October 2022 in Appeal No.13 of 2019 has rules that it is responsibility of

adjudicating authority to give clear finding on the amount due, if any. Therefore, it is important to quantify the claim amounts in the present cases.

- 14.2. The Commission notes that two aspects are necessary for computing LPS i.e. time delay in principal payment and applicable interest rate. The Petitioners have claimed following LPS amounts computed @ 1.25% monthly interest rate on principal outstanding:

Sr. No	Generators	Date	Interest Rate	LPS in (Rs. Crores)
1	MVNPL	Apr 17- July 22	1.25 %	1.33
2	VPL	Apr-18 –Feb 23		1.70
3	GEL	Apr-18 –Sep22		1.35
4	AAEL	Apr-18 – Aug 22		0.95

The Commission notes that MSEDCL has not commented on LPS computation in respect of AAEL, GEL and MVNPL. Further, in case of VPL also, MSEDCL in its initial reply did not make in comments of LPS computation filed by VPL.

- 14.3. However, in its additional notes of argument, MSEDCL has provided its computation of LPS liability in respect of VPL for the period March 2020 to November 2022, which works out to be Rs.56,41,177/-. This LPS liability has been calculated considering the adjustment made by it post issuance of Generic Tariff Order dated 29 July 2022 in Case No. 1/SM/2022 and its Review Order dated 13 February 2023 in Case No. 181 of 2022. In this regards it is important to note that MSEDCL has raised this issue of tariff adjustment on account of Generic tariff Order first time in its Notes of Argument and the said issues was never deliberated during the proceedings. Considering such new issue post matter has been reserved for Order without giving any opportunity to the Petitioner to respond on the same would be against the principle of natural justice. Hence, the Commission is not considering this new aspect raised by MSEDCL in its additional note of argument. However, MSEDCL is at liberty to file a separate Petition on this aspect by making concerned generator party.

- 14.4. In absence of MSEDCL’s reply on computation submitted by Petitioners, the Commission has worked out LPS based on documents on record and legal precedence. After perusal of EPA of VPL with MSEDCL, it is observed that Article (15.2) stipulates provision related to LPS, which reads as below:

“

*15.2 Payments*

.....

*In case of delay in payment beyond the due date, the project holder shall be entitled to interest on such delayed payment at the rate of 2% above the State bank of India (SBI) short term lending rates (STLR).*

.....”



But now, SBI has discontinued SBI short term lending rate. On similar issue, the Commission in its Order dated 12 January 2023 in Case No.199 of 2018 and Ors ruled following on DPC interest Rate:

“

*18.2.5 From excel sheet computation, it is evident that dues under consideration are pertaining to project capacity of 7.2 MW located at Ahmednagar. As per WEPA stipulations, Article 12.02 provides for payment of DPC at the rate of 2% per annum above SBI short term lending rate. The relevant Article reads as below:*

**“Section 12.02 Payments-**

*The due date of payment shall be 45 days from the receipt of the Seller’s monthly energy bills by the MSEDCL and will be paid by account payee’s cheque in the name of seller or authorised representative, in whose name power of attorney is given by the seller. In case of delay in payment beyond the due date, the Seller shall be entitled to interest on such delayed payment at the **rate of 2% per annum above State Bank of India short term lending rates**. The MSEDCL however, shall be entitled to make adjustment in the Seller’s Invoices for any charges / costs incurred on behalf of the Seller and payable by the Seller under this Agreement. This shall be shown in the audited statement issued by MSEDCL.”*

*WEPA does not define any specific benchmark rate as short term lending rate of SBI. Over the period, SBI has been using various benchmark rates such as Prime Lending Rate, Base Rate and Marginal Cost of Funds Based Lending Rate (MCLR) for deciding its short-term lending rate from time to time. Although, SBI continued to declare all such benchmark rate for reference, but while granting new loans, it is using only the recent applicable benchmark rate. As WEPA does not specify any specific benchmark rate, for deciding applicable interest rate for DPC, benchmark rate being used by SBI for deciding its short-term lending rate for relevant period needs to be considered. In the present case, DPC needs to be computed from 20 October 2017 onwards. Since 1 April 2016 onwards, SBI has been using MCLR for deciding its short-term lending rate. Hence, the Commission has used SBI’s 1-year MCLR for relevant period to arrive at weighted average rate of interest for that period and thereafter added 2% as stipulated in PPA for arriving at rate of interest for computing DPC against each bill. DPC is computed for the period between bill due date and date on which MSEDCL has paid principal amount. Rate of interest is worked out for each bill, which may vary from bill to bill depending upon period involved.”*

Above dispensation is righteously applicable in present case. Accordingly for computing LPS claim in respect of VPL, the Commission has considered rate of SBI MCLR +2% as interest rate.

14.5. Accordingly, the Commission quantifies LPS payable to the Petitioners by applying Law of Limitation, which works out to be as below:

Sr. No	Petitioner	LPS as per Petitioner (Rs. Crores)	LPS computed by the Commission (Rs. Crores)	Rationale for variation
1	MVNPL	1.33	0.99	Claims for months of April-2017 to November-2018 whose due date for payments were between July 2017 to February 2019 are disallowed on account of time barred claims.
2	VPL	1.70	0.92	Interest rate @ SBI MCLR+2% is considered. Claims for the months of April-2018 to November-2018 whose due date for payments were between June 2018 to January 2019 are disallowed on account of time barred claims.
3	GEL	1.35	1.22	Claims for months of April-2018 to November-2018 whose due date for payments were between July 2018 to January 2019 are disallowed on account of time barred claims.
4	AAEL	0.95	0.84	Correct calendar days have been considered in each month instead of 30 days/month. Claims for months of April-2018 to November-2018 whose due date for payments were between July 2018 to January 2019 are disallowed on account of time barred claims.

14.6. The Commission notes that the Petitioners have also claimed penal interest @ 1.25% per month on delayed LPS payment. The Petitioners have relied upon the Commission's Order dated 15 June 2018 in Case No.102 of 2018 and 10 August 2016 in Case No.150 of 2015 for sufficing claim of penal interest.

14.7. The Commission notes that in Case No. 150 of 2015 in the matter of *Hindustan Zinc Limited v. Maharashtra State Electricity Distribution Company Limited*, the Commission vide its Order dated 10 August 2016 upheld that MSEDCL is liable to pay DPC/LPS on the outstanding payments. The relevant portion of the aforesaid Order is reproduced herein below:

*“In view of the foregoing, the Commission directs MSEDCL to pay the late payment surcharge due to HZL as per Section 11.04 of the EPA within 30 days. **Thereafter, interest will be payable to HZL at 1.25% per month on any surcharge amount remaining to be paid.**”*

14.8. It is pertinent to note that MSEDCL had appealed against the abovementioned Order dated 10 August 2016 before the Hon’ble APTEL and the Hon’ble APTEL vide its Judgement dated 24 April 2018 in Appeal No.75 of 2017 in the matter of *MSEDCL v. Maharashtra Electricity Regulatory Commission & Anr.* has upheld the decision of the Commission.

14.9. Further, APTEL in its Judgement dated 20 September 2021 in Appeal No. 386 of 2019 held that Respondent wind generator is entitled to receive interest of DPC/LPS in case of late payment by MSEDCL. The relevant extract has been reproduced below for ready reference:

“  
40.  
...  
*The present case is a perfect illustration of the importance of awarding interest on LPD / DPC, as the appellant has, year after year, caused massive delay in payments and compelled the respondent to initiate legal proceedings before the State Commission for recovery of its legitimate dues.*”

14.10. The Commission notes that interest of 1.25% per month on LPS is not provided in the EPA. MSEDCL’s practice of paying DPC/LPS after substantial time delay reduces time value of money. In past the Commission has allowed interest of 1.25% on unpaid DPC/LPS to various wind generators for compensating time value of money. Now claims have been made by Biomass generators. Circumstances in present matters are identical to Wind matters. Hence, the Commission allows interest of 1.25% per month on delayed payment of LPS.

14.11. Such interest is computed post payment of principal amount for the period between date of principal payment and date of LPS payment. LPS amount is yet to be paid, hence for purpose of computation, end date is considered as 30 November 2023. Accordingly, interest on LPS is computed as follows:

<b>Generators</b>	<b>LPS Amount (Rs. Crores)</b>	<b>Interest Rate</b>	<b>Interest on Delayed Payment of LPS (Rs. Crores)</b>
MVNPL	0.99	1.25% per month	0.46
VPL	0.92		0.40
GEL	1.22		0.53
AAEL	0.84		0.38

15. The Commission directs the Petitioners to raise invoice for above approved amounts of LPS and Interest on delayed payment of LPS on MSEDCL with due date as stipulated in respective EPA. MSEDCL is directed to pay such amount within a due date. In case of failure to pay within due

date, the Petitioners may take recourse to mechanism stipulated in recently notified the Electricity (Late Payment Surcharge and related matters) Rules 2022 for recovering its due amount.

16. Hence, the following Order.

**ORDER**

1. Case Nos. 68, 69, 70 and 71 of 2023 are party allowed.
2. The Petitioners are eligible for LPS and Penal interest as follows:

Petitioner	Late payment Surcharge (Rs. Crore)	Interest on Delayed payment of LPS (Rs. Crore)	Total (Rs. Crore)
MVNPL	0.99	0.46	1.45
VPL	0.92	0.40	1.32
GEL	1.22	0.53	1.75
AAEL	0.84	0.38	1.22


MSEDCL to pay above claims within timelines stipulated in respective EPAs after receipt of supplementary bill.

3. MSEDCL is at liberty to approach afresh with regards to revision in LPS liability as specified in Para (14.3).

Sd/-  
(Surendra J. Biyani)  
Member

Sd/-  
(Anand M. Limaye)  
Member

Sd/-  
(Sanjay Kumar)  
Chairperson

  
(Dr. Rajendra G. Ambekar)  
Secretary

