

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No 212 of 2023

Petition file by Chetan Purushottam Patel (CPP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Chetan Purushottam Patel (CPP):	Petitioner
Maharashtra State Electricity Distribution Co. Ltd (MSEDCL):	Respondent

Case No 216 of 2023

Petition file by Jignesh Vallabh Patel (JVP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Jignesh Vallabh Patel (JVP):	Petitioner
Maharashtra State Electricity Distribution Co. Ltd (MSEDCL):	Respondent

Case No 217 of 2023

Petition file by Jayesh Purushottam Patel (JPP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Jayesh Purushottam Patel (JPP):	Petitioner
Maharashtra State Electricity Distribution Co. Ltd (MSEDCL):	Respondent

Case No 218 of 2023

Petition file by Purushottam Laljibhai Patel (PLP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Purushottam Laljibhai Patel (PLP): Petitioner

Maharashtra State Electricity Distribution Co. Ltd (MSEDCL): Respondent

Case No 219 of 2023

Petition file by Vallabhbhai Laljibhai Patel (VLP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Vallabhbhai Laljibhai Patel (VLP): Petitioner

Maharashtra State Electricity Distribution Co. Ltd (MSEDCL): Respondent

Case No 220 of 2023

Petition file by Vipul Vallabh Patel (VVP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Vipul Vallabh Patel (VVP): Petitioner

Maharashtra State Electricity Distribution Co. Ltd (MSEDCL): Respondent

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Case No 223 of 2023

Petition file by Satyen Vallabh Patel (SVP) under Section 86 (1) (e) & (f) of the Electricity Act, 2003 for adjudication of dispute and seeking directions against MSEDCL to comply with the terms of the Wind Energy Purchase Agreements.

Satyen Vallabh Patel (SVP): Petitioner

Maharashtra State Electricity Distribution Co. Ltd (MSEDCL): Respondent

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

Appearance:

For the Petitioners: :- Ms. Dipali Sheth (Adv.)
For the Respondent: :- Mr. Udit Gupta (Adv.)

COMBINED ORDER

Date: 16 October 2024

1. The present Petitions are filed by various individual wind energy generators viz, CPP, JVP, JPP, PLP, VLP, VVP and SVP (the Petitioners) seeking directions against MSEDCL for recovery of outstanding dues against invoices as well as Delayed Payment Charges (DPC) for delayed payment of invoices under their respective wind Energy Purchase Agreements (EPAs) with MSEDCL. These Petitions have been filed on following dates:

Case No.	Date of filing
Case No.212 of 2023	02 November 2023
Case No.216 of 2023, 217 of 2023	06 November 2023
Case No.218 of 2023, 219 of 2023	07 November 2023
Case No.220 of 2023	09 November 2023
Case No. 223 of 2023	10 November 2023

2. **Prayers of Petitioner are as follows:**

Since the prayers are similar/ common in all Petitions, for the sake of brevity prayers in Case No. 212 of 2023 are reproduced as below:

“

- a) *Direct the Respondent to make payment for the wind energy generated by the Petitioner regularly and in timely manner as per all the WEPAs;*
- b) *Hold and declare that the Undertaking dated December 4, 2020 furnished by the Petitioner to MSEDCL stood revoked due to non-payment in agreed time;*
- c) *Direct MSEDCL to make payment of the outstanding amount towards monthly invoices due within seven (7) days amounting to Rs. 28,95,744/- (Rupees Twenty-Eight Lakhs Ninety-Five Thousand Seven Hundred and Forty-Four Only) for a period from June 2023 till August 2023 as detailed in **Annex D**;*

- d) Direct MSEDCL to make a payment of Rs. 6,56,078/- (Rupees Six Lakhs Fifty-Six Thousand and Seventy-Eight Only) outstanding towards DPC on unpaid invoices prior to March 2018 and a sum of Rs. 34,89,955/- (Rupees Thirty-Four Lakhs Eighty-Nine Thousand Nine Hundred and Fifty-Five Only) outstanding towards DPC on unpaid invoices post April 2018 as detailed in **Annex D**;
- e) Direct MSEDCL to make a payment of a sum of Rs. 15,55,756/- (Rupees Fifteen Lakhs Fifty-Five Thousand Seven Hundred and Fifty-Six Only) outstanding towards interest on unpaid DPC prior April 2018 and a sum of Rs. 12,51,901/- (Rupees Twelve Lakhs Fifty-One Thousand Nine Hundred and One Only) outstanding towards interest on unpaid DPC post April 2018 as detailed in **Annex D**;
- f) Direct the Respondent to pay carrying cost at the rate of 15% per annum of the delay in payment of DPC by the Respondent;
- g) Direct MSEDCL to furnish head wise details of payments made to the Petitioner;

.... ”

The claimed amount in each Petition is different, which is mentioned at para (3.4) of this Order.

3. The Petitioners in their Petitions stated as below:

- 3.1. The Petitioners are wind generators having long-term & short-term contractual arrangement with MSEDCL. Details of the same are as below:

Sr. No.	Generators	Installed Capacity	Location (Location No.)	Long Term EPA	Short Term EPA
1	CPP (Case No.212 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (84)	30.05.2007 – 30.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (92)	07.06.2012- 27.02.2025	-
2	JVP (Case No.216 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (83)	30.05.2007-28.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (131)	19.07.2013-16.02.2024	-
3	JPP (Case No.217 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (95)	30.05.2007- 28.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (76)	19.07.2013-02.07.2025	-
4	PLP (Case No.218 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (45)	21.05.2007-05.02.2020	06.02.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (91)	04.01.2012- 29.09.2024	-
5	VLP (Case		Panchpatta (76)	30.05.2007- 28.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021,

Sr. No.	Generators	Installed Capacity	Location (Location No.)	Long Term EPA	Short Term EPA
	No.219 of 2023)	2.4 MW (3x0.8 MW)			01.01.2022- 31.12.2022
			Satara (135)	19.07.2013 - 29.09.2023	-
			Satara (133)	30.07.2013 -16.02.2024	-
6	VVP (Case No.220 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (80)	30.05.2007-30.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (90)	04.01.2012-29.09.2024	-
7.	SVP (Case No.223 of 2023)	1.6 MW (2x0.8 MW)	Panchpatta (94)	30.05.2007- 28.03.2020	01.04.2020- 31.12.2020, 01.01.2021- 31.12.2021, 01.01.2022- 31.12.2022
			Satara (132)	30.07.2013-16.02.2024	-

3.2. It is pertinent to note that provisions of rate of DPC and credit periods are different in long term EPAs for Panchpatta and Satara Locations. Details of the same are as below:

Location	Credit Period	Rate of DPC
Panchpatta (45,76,80,84,83, 94,95)	45 days from receipt of invoice	2% above SBI short term lending rate.
Satara (91, 76,90,92,131,132, 135, 133)	60 days from receipt of invoice	1.25% per month.

3.3. Pursuant to the execution of the WEPAs, the Petitioners have been raising monthly invoices to MSEDCL for the energy generated and supplied by the Petitioners. The Petitioners sent demand request for the outstanding invoices and DPC to MSEDCL, however, MSEDCL failed and neglected to pay the same as per the due date specified in the WEPAs.

3.4. Statement of outstanding claims submitted by the Petitioners are as follows:

(As on 30 September 2023)

Case No.	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
Principle Amount Due	28,95,744	22,52,127	27,27,234	28,83,292	57,87,090	30,14,372	21,79,996
Period of Amount	June 2023 till August 2023						
DPC Due	Prior to March -2018	6,56,078	4,47,585	8,55,108	6,52,664	4,43,079	6,52,782
	Post April 2018	34,89,955	31,87,415	39,08,842	38,11,495	56,88,633	32,34,238
	Total -	41,46,033	36,35,000	47,63,950	44,64,159	61,31,712	39,17,622
DPC Interest	Prior to April-2018	15,55,756	12,32,968	17,04,353	15,32,416	14,79,324	13,36,503
	Post April 2018-	12,51,901	11,20,679	14,77,101	14,07,149	13,81,009	11,79,898
	Total	28,07,657	23,53,647	31,81,454	29,39,565	28,60,333	25,61,289

3.5. The Petitioners highlighted that there was consistent failure on the part of MSEDCL to make timely payments towards invoices raised by the Petitioners which led to the filing of the Petitions bearing Case Nos. 192, 193, 195,196, 197, 198, 203 of 2018 wherein it claimed the pending dues for the period up to March 2018.

The said Petitions came to be disposed off vide Common Order dated 28 September 2018, wherein the Commission had directed the parties to reconcile the claims within two (2) weeks from the date of the Order and allowed MSEDCL to release payments as per payment plan allegedly submitted by MSEDCL vide its letter dated 12 September 2018.

3.6. MSEDCL failed to comply with the Commission's directives by neglecting to make the required payments for DPC associated with the outstanding principal sums up to March 2018. Because of this non-compliance, the Petitioners are entitled to the DPC charges, in addition to the corresponding interest incurred due to the non-payment of said DPC charges up to March 2018.

3.7. MSEDCL neither furnished any alleged Payment Plan nor intimated the date of payment pursuant to Order dated 28 September 2018 of the Commission. The Petitioners awaited receipt of payment and made repeated requests to MSEDCL. The Petitioners received such Payment Plan belatedly from some other Developer, wherein the payment was promised to be made on or before March 2019. Therefore, MSEDCL acknowledged debt due for March 2018 vide its Payment Plan and extended the limitation period till March 2022.

3.8. In view of the above, the claim of Petitioners for such dues pertaining to earlier Petition is not time-barred as Hon'ble Supreme Court of India vide order dated 10 January 2022 in *Suo Motu Writ Petition (Civil) No(s).3/2020* held that the limitation period in all proceedings, from period 15 March 2020 till 28 February 2022 shall stand excluded irrespective of the limitation prescribed under the general law or special laws whether condonable or not and shall commence from 01 March 2022. Consequently, the limitation period would resume from March 2022 up to March 2024 and therefore the present Petitions are not time barred.

3.9. Further, in order to receive at least principal amounts which remained unpaid for very long time, at the request of MSEDCL and in order to support MSEDCL, the Petitioners furnished an undertaking dated 4 December 2020 to waive off DPC in respect of unpaid and outstanding invoices for the period from May, 2018 to March, 2021, on the basis of promise that the payment shall be released in agreed and stipulated time by MSEDCL. Such undertaking acknowledges the dues commencing the limitation period from December 2020.

3.10. It is pertinent to note that the agreed time for payment was thirty (30) days from the date of Undertaking which is inadvertently not included. However, even after giving the Undertaking, MSEDCL did not release payments in a timely manner. MSEDCL has released the payments between January 2021 to April 2022. The Undertaking provides for

the words 'on or before _____' which clearly shows the intention of the Petitioners and MSEDCL to stipulate a period for MSEDCL to pay the outstanding invoices in exchange of waiver of DPC in respect of unpaid and outstanding invoices. Therefore, a contract must be read as a whole, and every attempt should be to harmonise the terms thereof.

- 3.11. When an unexpressed term is considered in an agreement, it would be justified on the basis that such a term was always and obviously intended by and between the parties thereto to give the business efficacy to the agreement. Therefore, even if the Undertaking had inadvertently not mentioned the exact date on or before which MSEDCL had to pay the outstanding invoices, it is prudent to consider a reasonable time i.e., in event as observed by the Undertakings provided by other similarly placed generators, the period to be thirty (30) days. MSEDCL is desirous of taking undue advantage of inadvertent blank in such Undertaking which cannot be allowed. The justifying the stand, the Petitioners relied upon *Transmission Corporation of Andhra Pradesh Limited and Ors vs. GMR Vemagiri Power Generation Limited and Anr (2018) 3 Supreme Court Cases 716*.
- 3.12. Section 54 of the Indian Contract Act, 1872 provides that when a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. In *Prashant Kumar Shahi vs. Ghaziabad Development Authority (2000) 4 SCC 120*, the Hon'ble Supreme Court held that when the other party has failed to perform its part of agreement, cannot at later stage state claim that it is not entitled to pay interest.
- 3.13. As MSEDCL failed to make payment within a period of (30) days from date of submission of undertaking, the same needs to be hold revoked. MSEDCL vide its letter dated 16 November 2022 communicated the same to MSEDCL. The Petitioners relied upon *Indian Council for Enviro –Legal Action v. Union of India & Ors, (2011) 8 SCC 161* wherein in is categorically highlighted that no person can be allowed to take advantage of its own wrong.
- 3.14. The Petitioners are power producers, and the sale of power is the source of income of the Petitioners. The projects of the Petitioners viz; Panchpatta and Satara are funded projects. It is well known fact that the power projects are financed on the basis of its projected cash flows which are as identified in the WEPAs. The Petitioners are required to service the debt on monthly basis in timely manner as any default under the financing agreements leads to default consequences which include declaring their account as non-performing asset amongst others. In view of the foregoing, non-payment of invoices for a period of more than six (6) months and further delayed payments for invoices since April 2018 for Panchpatta and Satara Project without DPC has caused grave harm, prejudice and insurmountable losses to the Petitioners.

- 3.15. WEPA's are valid and binding contracts between the Petitioners and MSEDCL and hence, MSEDCL ought to abide by the terms of the WEPA's including payment in specified time and payment of DPC in case of delay in payment.
- 3.16. The long term WEPA already provide for the due date to be forty-five (45) days for Panchpatta Project and long term WEPA for Satara Project and short term WEPA's for Panchpatta Project provide for the due date to be sixty (60) days, upon the receipt of the invoices, which is very liberal compared to other states where it is thirty (30) days or less. Despite such liberal provisions, MSEDCL invariably delays the payment of invoices, resulting in substantial loss and prejudice to the Petitioners.
- 3.17. As per the Long Term WEPA's entered between the Petitioners and MSEDCL for the projects developed in Panchpatta, in case of any delay by MSEDCL in paying amounts towards invoices raised by the Petitioners, interest at the rate of State Bank of India (SBI) Short Term Lending Rate +2% was to be applicable. However, SBI discontinued with levy of SBI Short Term Lending Rate and since SBI Short Term Lending Rate is no longer available. In Petition, the Petitioners have calculated DPC considering (15) % p.a. interest rate.
- 3.18. As per provisions of MERC (Electricity Supply Code and Standards of Performance of Distribution Licensees including Power Quality) Regulations, 2020, and MSEDCL's Multi-Year Tariff Order for FY 2020-2021 to FY 2024-2025 it can recover DPC from a consumer at the rate of 1.25% per month on simple interest basis for non-payment of the bill amount. Accordingly, the Petitioners requested the Commission to consider DPC at (15) % p.a.
- 3.19. The Commission in its past Order has requested similarly placed generators to consider the option of recovering dues from MSEDCL under the Electricity (Late Payment Surcharge and Related Matters), Rules, 2022 (LPS Rules, 2022) issued by Ministry of Power on 3 June 2022. The LPS, 2022 provide for maintenance of adequate payment security mechanism such as letter of credit or letter of credit backed by escrow arrangement under the agreement with Distribution Licensee. LPS Rules, 2022 also provide that a generating company would lose its right to collect any late payment surcharge if a generator supplies power without the payment security mechanism or without advance payment.
- 3.20. The Petitioners urged that it cannot avail remedy under the LPS Rules, 2022 and submitted that the same cannot be applied in the present Petition.
- 3.21. For justifying penal interest, the Petitioners referred to APTEL's following Orders:
- Order dated 24 April 2018 in Appeal No.75 of 2017, and
 - Order dated 7 May 2018 in batch of Appeals viz; Appeal Nos. 60, 61, 62, 63, 64, 65, 66, 67 and 68 of 2018.
- 3.22. WEPA contains articles pertaining to dispute resolution. In said articles, the Commission is conferred with jurisdiction to deal with non-performance of any obligation under WEPA.

Considering the contractual settings, the Commission has the jurisdiction to deal in the present matter.

4. **MSEDCL in its submission dated 17 May 2024 stated as below:**

- 4.1 The present Petitions pertains to the alleged outstanding dues against invoices as well as DPC. For the projects established in Panchpatta (Nashik), DPC is computed at the rate of (2) % per annum above SBI short term lending rates. For projects in Satara district DPC rate is (15) % per annum.

Arguments on Limitation:

- 4.2 DPC and Penal Interest Claim for the periods pre-October-2020 are barred by the law of limitation. Hence, cannot be considered for any interference in the present Petition. If a party has sat on the fence, then, they themselves are taking the risk of not agitating the claim within the statutory prescribed time frame and if indulgence is being shown in such belated case, then it would encourage the non-vigilant other similarly placed generators to the prejudice of MSEDCL, whereby ultimately the end consumer will suffer.
- 4.3 In respect of construction of period of limitation, it is equally well settled principle of law that mere correspondence between the parties would not extend the limitation period. For justifying argument, MSEDCL referred to the Hon'ble Supreme Court Judgment in *Band TAG Versus Ministry of Defence; 2023 SCC OnLine SC 657*.
- 4.4 Assuming though not admitting that if the Commission grants prayer (b) and declare the 'undertaking' dated 04 December 2020 as revoked then as a natural corollary to the same no reliance can still be placed by the Petitioners on a non-existing document so as to seek recovery of the alleged dues as claimed under prayer (d) & (e).
- 4.5 As per MSEDCL in terms of the Hon'ble Supreme Court's Covid-19 – Limitation Order, the Petition ought to have been filed on or before 30 May 2022. The Petitioners has not stated any reasons/facts explaining the delay in approaching the Commission at belated stage for the past period in question.
- 4.6 The Petition should not be permitted to seek a declaration of the 'Undertaking' being non-existent yet chooses to rely on the same to assert maintainability of the present belated Petition in reference to prayer (d) & (e).
- 4.7 The Petitioners have not stated any reasons / facts in explaining the delay in approaching the Commission at this belated stage for the past period in question. Therefore, the present petition being barred by limitation ought to be rejected at the outset.

Submission on merits:

- 4.8 According to MSEDCL, the Petitioners have calculated DPC incorrectly and payments made have not been taken into consideration.
- 4.9 MSEDCL has settled Principal payment as below:

	Period Claim	Paid on	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
Principal Amount (after TDS Deduction)	June-2023	28.11.2023	10,39,275	7,67,273	10,75,854	10,50,100	16,54,939	10,82,577	7,37,703
	July-2023	02.01.2024	10,21,838	8,74,768 *	8,81,167	10,21,838	23,15,106	10,67,963	8,41,166
	August-2023	28.02.2024	8,31,735	6,07,808	7,67,456	8,08,471	18,11,197	8,60,817	5,98,917
Total			18,53,573	22,49,849	27,24,477	28,80,409	57,81,242	30,11,357	21,77,786

*Paid on 17.05.2024

4.10 DPC Payment have been settled as per wind payment plant, in following manner:

	Period Claim	Paid on	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
DPC Payment	Apr to Jun-2021	08.06.2022	1,54,507	1,04,029	1,82,622	1,69,912	2,38,246	1,58,917	99,295
	July-2021 to Sep-2021	06.09.2022	2,62,161.82	1,94,903	2,57,328	2,62,674	4,87,115	2,65,535	1,87,861
	Oct-2021 to Dec-2021	02.11.2022	77,910	1,07,581	76,276	84,624	1,82,036	86,541	97,102
Total			4,94,578.82	4,06,513	5,16,226	5,17,210	9,07,397	5,10,993	3,84,258

4.11 Balance DPC payment details are as below:

	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
DPC Claim	41,46,033	36,35,000	47,63,950	44,64,159	61,31,712	39,17,622	38,87,020
DPC Paid on 02.05.2024	3,54,171	3,20,754	3,89,150	3,67,095	6,97,702	3,51,156	3,44,391

4.12 Wind Payment Plan for Generation period January-2020 to December-2022 had been submitted to the Commission and also had uploaded on MSEDCL's Website. Accordingly, MSEDCL has already released all Principal as well as DPC payment as per payment plan to the Petitioners. Hence, it is prayed that the Commission not to levy any penal interest on MSEDCL.

4.13 The Commission vide its Common Order dated 28 September 2018 passed in Case No. 193 of 2018 & Ors, had directed MSEDCL to release the agreed/admitted payment to the Petitioners on account of the principal amount and DPC for liability up to March 2018 as per the payment plan submitted by MSEDCL on 12 September 2018 and also had directed to complete the reconciliation within two weeks from the date of the said Order. In compliance, MSEDCL had carried out the reconciliation process with the Petitioners on 15 October 2018 and as per the reconciled DPC statement paid out following amounts:

Sr.No.	Case No.	DPC Amount (In Rs.)	Date of Payment
1	212 of 2023	27,54,651/-	26.04.2021
2	216 of 2023	23,28,730.97/-	26.04.2021
3	217 of 2023	27,52,500/-	26.04.2021
4	218 of 2023	26,94,710.56/-	26.04.2021

Sr.No.	Case No.	DPC Amount (In Rs.)	Date of Payment
5	219 of 2023	21,88,504.22/-	26.04.2021
6	220 of 2023	24,34,126.05/-	26.04.2021
7	223 of 2023	22,06,130.02/-	26.04.2021

4.14 The difference in DPC amount is due to following reasons:

- The Petitioner has considered the rate of 15% for calculation of DPC, despite agreeing in the reconciliation process of the computation of DPC as per WEPA.
- The Petitioner had agreed to waive off DPC in respect of unpaid outstanding invoices for period from May 2018 to March, 2021 vide undertaking dated 04 December 2020 and as such cannot to the contrary take a position.
- Further, the Petitioners for the very first time directly have raised their alleged claim for the period from January - 2022 to March -2023 towards DPC and the Penal interest without approaching MSEDCL earlier nor raised any invoice till date for aforesaid claims.

Arguments on revocation of undertaking dated 4 December 2020

- 4.15 The Petitioners have furnished an undertaking dated 04 December 2020 to waive off DPC in respect of unpaid and outstanding invoices from May 2018 to March 2021, therefore the claim in the present Petitions for Penal Interest for the very same period is not applicable.
- 4.16 The Petitioners have voluntarily submitted an unconditional mutually agreed and discussed Undertaking on 04 December 2020 qua DPC Waiver to MSEDCL for the above-said period. MSEDCL in compliance and abidance thereof has already released payment for Undertaking period i.e., May 2018 to March 2021 in FY 2018-2021 i.e., before issuing the alleged letter of revocation on 16 November 2022.
- 4.17 Since, no occasion or cause of action has arisen for issuing the letter of revocation, particularly post receipt of the benefit in terms of the ‘Undertaking’, as the same was rightly replied in objection by MSEDCL vide its email dated 12 January 2024.
- 4.18 Furthermore, interest on DPC is also not applicable for period from April - 2021 to Dec - 2021 because MSEDCL has paid the DPC as per the Wind Payment Plan.
- 4.19 After passing of two years of giving the said undertaking, the Petitioners have unilaterally chosen to revoke the said undertaking vide its letter dated 16 November 2022 allegedly on the reason that MSEDCL has failed to release principal payments on time, which is factually incorrect. The Petitioner is already in receipt of payments being released by MSEDCL as agreed in the ‘Undertaking’.
- 4.20 The Petitioners under the guise of revocation now seeks to receive DPC payment with penal interest despite agreeing waiver thereof as well as in compliance of such waiver undertaking have already received the benefit of release of principal amount.

- 4.21 The said undertaking was 'unconditional' on the part of MSEDCL. The contention of the Petitioners stating that the said period was orally agreed as (30) days to make payments and after which carrying cost was applicable, has also not been supported by any documents or evidence. Therefore, it is evident that the revocation of the said undertaking is an afterthought.
- 4.22 The Commission vide its Combined Order dated 12 January 2023 passed in Case No. 199, 245 & 273 of 2018 read with the provisions contained in Article 19 of the WEPA, has also considered the waiver through 'Undertaking' as legally valid arrangement between the parties.
- 4.23 Further, the Commission vide its Common Order dated 04.02.2022 passed in Case No. 107 of 2021 & Ors has observed that any grievance of the Petitioner if any qua the Undertaking was there, then they should have approached the Commission before furnishing such Undertaking.
- 4.24 Thus, in view of the above submissions, it is submitted that the unilateral revocation of the said undertaking deserves to be dismissed.
- 4.25 The Petitioner cannot pick and choose the effect of the undertaking as per their convenience i.e., on one hand for the purposes of computation of period of limitation the undertaking should be acknowledged as legally valid and on the other hand for the purposes of computation of claim of the waived off period, the same undertaking should be regarded as non-existing.
- 4.26 The Commission vide its Order dated 23 April 2023 passed in Case No 157 of 2023, has ruled that the waiver undertakings are legally valid arrangement.

Penal Interest on DPC

- 4.27 The prayer regarding grant of 1.25% per month on DPC in the present case is unfounded and thus, should not be allowed. The Commission has taken similar view in its Order in Case No.107 of 2021 dated 04 February 2022 and Case No.160 of 2021 dated 15 April 2022.
- 4.28 The Petitioner's claim of interest@1.25% per month on DPC till final payment on outstanding DPC amount is not maintainable as no provision exists in the WEPA in this regard. Furthermore, the liability with respect to penal interest of 1.25% per month would only be attracted, in case the timeline given by the Commission for payment of principal amount as well as DPC is not adhered by MSEDCL. In present case no such timeline exists and hence the present Petition is premature.
- 4.29 Additionally, as per WEPA provisions operating charges of Rs.10,000/- is payable by seller to MSEDCL, accordingly MSEDCL is deducted Rs.10,000/- yearly from seller's invoice in the Month of April of every year. The Petitioners have not deducted Rs.10,000/- from

invoice amount while calculating DPC amount. Hence, there is difference in DPC amount in the month of April of every year in MSEDCL and the Petitioner's DPC calculation.

- 4.30 The Petitioners have not considered earlier DPC payments made by MSEDCL. As on date there is no outstanding DPC with MSEDCL.
- 4.31 The prayers of the Petitioners are not maintainable and deserves to be dismissed. It is also pertinent to note that the delay in making payment is neither deliberate nor intentional and is solely attributable to the financial constraints of MSEDCL which have arisen due to increase in revenue gap and shortfall in collection as per ARR. Further, MSEDCL is taking best efforts to make the payment to generators by borrowing loan from banks.

5. Petitioners in their Rejoinder dated 03 June 2024 stated as below:

- 5.1 In present Petitions, the Petitioners are seeking outstanding dues under long-term WEPA dated 30 May 2007 and 07 June 2012 and short-term WEPAs dated 11 December 2019, 22 July 2020 and 29 September 2021.
- 5.2 The Petitioner's claim for outstanding dues from April 2018, as per the Undertaking, is not barred by limitation. The limitation period of three (3) years recommenced on 4 December 2020 and concluded on 3 December 2023. The present Petition, filed on 23 October 2023, falls within this timeframe, affirming that it is not time- barred and not liable to be dismissed.
- 5.3 In an event if the Undertaking is construed to be not recommencing the limitation period, the limitation period for the claim pertaining to April 2018 should be considered initially, from April 2018 to 15 March 2020 i.e., approximately 1 year and 11 months and then excluding period from 15 March 2020 to 28 February 2022 in accordance with the Order of the Supreme Court in *Suo Motu Writ Petition (Civil) No(s).3/2020* due to COVID, the limitation period resumes on 28 February 2022 and concludes on 28 March 2023, completing a three (3) year period of limitation. This differs from the date of 30 May 2022, as contended by MSEDCL in its Reply. This discrepancy indicates that MSEDCL's calculation of the limitation period cannot be relied upon.
- 5.4 Furthermore, the Petitioner contends that the current Petition is not time- barred, as MSEDCL admitted liability for DPC from May 2018 in December 2020. The Petitioner's contention is not that the Undertaking is non-existent, the Petitioner's contention is that due to non-fulfilling of conditions in the said Undertaking, the same stood revoked. MSEDCL is trying to mislead the Commission by making such false submissions. With the Petitioner's claim for outstanding dues from April 2018 supported by the Undertaking, falling within the three-year limitation period recommencing from 04 December 2020 to 03 December 2023, and the Petition filed on 23 October 2023, which is not time- barred.
- 5.5 MSEDCL acknowledged debt due for March 2018 to be paid in March 2019 vide Payment Plan and extended the limitation period till March 2022. In view of the above, the claim of Petitioners for such dues pertaining to earlier Petitions are not time-barred as SC COVID

Order held that the limitation period in all proceedings, from period 15 March 2020 till 28 February 2022 shall stand excluded irrespective of the limitation prescribed under the general law or special laws whether condonable or not and shall commence from 01 March 2022. Consequently, the limitation period would resume from March 2022 up to March 2024 and therefore the present Petition is not time barred. MSEDCL is not denying the payment due and payable to the Petitioner but refusing to pay the same on frivolous ground of limitation.

- 5.6 MSEDCL is indeed adopting a contradictory stance by emphasizing that the Petitioner's plea to declare the Undertaking as being revoked renders it non-existent, thereby disputing the recommencement of the limitation period, while simultaneously relying on the Undertaking, asserting that the Petitioners willingly signed it, thus absolving MSEDCL from making payments towards DPC for the period from May 2018 to March 2021.
- 5.7 In Case No. 68, 69,70 & 71 of 2013 referred by MSEDCL, it is noted that according to the SC COVID Order, if the limitation period expired between 15 March 2020 and 28 February 2022, despite any remaining balance period, individuals are granted a 90- day limitation period from 01 March 2022. However, in the current Petitions, the limitation period for the claims did not expire within this specified timeframe, and there was still a balance limitation period available. Therefore, the case referred by MSEDCL is not relevant to present proceedings.
- 5.8 The payments for invoices for the months of June 2023, July 2023 and August 2023 was done by MSEDCL belatedly i.e., after 60 to 105 days of due date and also after the filing of the present Petition. Therefore, the claim of Petitioner for DPC is substantiated.
- 5.9 Petitioner was neither provided with any alleged Payment Plan nor informed of the payment date following the aforementioned Original Order of this Hon'ble Commission as contended by MSEDCL. Needless to state that since Petitioner never agreed to such unilateral change of payment terms, MSEDCL is liable to pay DPC as well as interest on such delayed payment of DPC.
- 5.10 The Petitioner further reiterates that to support MSEDCL, they provided the Undertaking for overdue outstanding invoices from May 2018 to March 2021, expecting payment within thirty (30) days as agreed by MSEDCL. Due to MSEDCL's failure to adhere to this timeline, the Undertaking is considered revoked vide Revocation Letter dated 16 November 2022.
- 5.11 Additionally, as per Section 12.02 of WEPA dated 30 May 2007 and Section 11.04 of WEPA dated 07 June 2012 entered between the Petitioner and MSEDCL for projects situated at Panchpatta and Satara, MSEDCL is obliged to release payments for invoices issued by the Petitioner within forty-five (45) and sixty (60) days respectively, without requiring any separate notice, as invoices were regularly sent to MSEDCL. Additionally, the Petitioner had a meeting with representatives from MSEDCL at their office to discuss

delayed payments. It was during this meeting that MSEDCL proposed the execution of an Undertaking by the Petitioners. Further, the Petitioners also sent Demand Request vide letter dated 10 July 2019 for outstanding payments. Hence, MSEDCL cannot contend that the Petitioners never approached them regarding their claims. Further, in case of delay in payment beyond the due date, the Petitioners are entitled to DPC.

- 5.12 The revocation of the Undertaking was communicated to MSEDCL through the Revocation Letter to just record such deemed revocation and which was deemed accepted by MSEDCL as no reply was sent. MSEDCL belatedly with a malafide intention and as an afterthought sent letter denying revocation.
- 5.13 When an unexpressed term is considered in an agreement, it would be justified on the basis that such a term was always and obviously intended by and between the parties thereto to give the business efficacy to the agreement. Therefore, it is submitted that even if the Undertaking had inadvertently not mentioned the exact date on or before which MSEDCL had to pay the outstanding invoices, it is prudent to consider a reasonable time i.e., in event as observed by the Undertakings provided by other similarly placed generators, the period to be thirty (30) days.
- 5.14 The Original Order, the Commission directed the parties to reconcile within two (2) weeks, and if MSEDCL deviates from its commitment, outlined in the Payment Plan, penal interest will accrue thereafter (beyond the committed date) at a rate of 1.25% per month on any DPC. Though the Petitioners did not agree to such Payment Plan, since MSEDCL failed to pay even after the reconciliation, MSEDCL is liable to pay 1.25 % p.m. from date of reconciliation till date of actual payment.
- 5.15 In Case No. 150 of 2015 (in the matter of Hindustan Zinc Limited vs MSEDCL), the Commission vide its Order dated 10 August 2016, directed MSEDCL to pay DPC as per WEPA and further interest will be payable to the Petitioner on any DPC remaining. Similarly, vide combined Order dated 16 March 2017 in Case Nos. 53, 62, 68, 74, 75, 79, 135, 136 and 144 of 2016 (in the matter of Shah Promoters & Developers and other Petitioners vs MSEDCL) the Commission had directed MSEDCL to pay the dues under the respective EPAs along with DPC within specified time and thereafter interest at the rate of 1.25% will be applicable on unpaid DPC.
6. During the hearing held on 04 June 2024, Advocate of Petitioners and Respondent made submissions as made out in the Petition/Rejoinder and their Replies.
7. **Petitioners in its Additional Submission dated 15 June 2024 stated as below:**
 - 7.1 The Petitioners presented brief timeline of the events in their respective matters. The Petitioner's claim for outstanding dues from April-2018, as per the Undertaking, is not barred by limitation. The limitation period of (3) years recommenced on 04 December 2020 and concluded on 03 December 2023. The present Petition is filed on 23 October 2023, falls within this timeframe, establishing that the Petition is not time-barred.

- 7.2 As per Section 18 of the Limitation Act, 1963, if the debtor makes an acknowledgment of their liability towards the creditor, during the limitation period, it gives rise to fresh limitation period to the creditor from the date of such acknowledgment. MSEDCL's request to the Petitioners to sign the Undertaking, agreeing to waive off DPC from May-2018 to March-2021 in exchange for a commitment to make timely payments towards invoices, constitutes an acknowledgment by MSEDCL of its liability towards DPC.
- 7.3 The Commission passed its common Order in Case No.203 of 2018 & (7) Ors (batch matter) on 28 September 2018. In said Order, the Commission held that if MSEDCL deviates from a Payment Plan, it is liable to pay interest @ 1.25% p.m. Sahyadri Industries Limited (SIL), who is one of the Petitioner in batch matter, appealed the Order dated 28 September 2018 before the APTEL. APTEL vide its Judgment dated 06 October 2022 remanded the matter back to the Commission, directing to provide clear findings. Although the APTEL Order specifically pertained to SIL, its findings are in rem and not in personam. Hence, clear findings on MSEDCL's liability and enforceability of its obligations should also be made in respect of the present Petitioners.
- 7.4 MSEDCL's argument that the Petitioners cannot restart the limitation period from the date of the Undertaking, while simultaneously relying on the Undertaking to assert that the Petitioners willingly signed it and absolve itself from DPC payments, may be perceived as cherry-picking. The Petitioners relied upon Reliance Industries Limited vs. SEBI (2022) 10 SCC 181. Further, MSEDCL's submissions that if Petitioner has revoked undertaking it cannot rely on same is untenable as the Petitioners are not refuting existence of Undertaking but due to non-compliance by MSEDCL, the Petitioners asserted its revocation.

7.5 Outstanding dues ** (calculated up to 31 May 2024) are as below:

Case No.	212 of 2023	216 of 2023	217 of 2023	218 of 2023	219 of 2023	220 of 2023	223 of 2023	
Principle Amount Due	9,25,899	16,44,550	10,02,545	9,31,895	7,29,141	9,50,497	6,61,739	
Period of Amount	December 2023 till March 2024							
DPC (2017-2024)	Outstanding DPC	34,42,393	30,31,010	39,93,873	37,25,415	48,54,276	31,65,471	32,69,731
	Difference on account of Administrative Charges	34,048	1,335	1,335	33,171	1,335	33,848	1,550
	Total Outstanding DPC	34,08,345	30,29,675	39,92,538	36,92,244	48,52,941	31,31,623	32,68,181
DPC Interest	2017 to 2024	25,59,324	22,24,919	28,20,007	27,04,068	26,94,584	24,13,359	22,73,355

** The figures outlined in the table above vary from those prayed by the Petitioners. Certain principal amounts and DPC have been settled by MSEDCL subsequent to filing of the present Petition.

8. MSEDCL on 19 July 2024 filed its written submission. MSEDCL has repeated its contentions made in replies and for sake of brevity not repeated herein.

Commission's Analysis and Rulings:

9. The Petitioners have filed the present Petition under 86 (1) (e) and (f) of Electricity Act 2003. The Petitioners are seeking payment of outstanding dues against invoices as well as DPC under WEPA.
10. The Commission notes that the in present Petitions, Petitioners are relying on contractual provisions in long-term and short-term EPAs. The Petitioners are operating wind generation units at Panchapatta and Satara locations. For Panchapatta locations, tenure of long term WEPAs have been completed and subsequently the Petitioners executed Short Term EPAs. As on date of Petition filing, for Satara location, tenure of long-term EPAs are continuing.
11. Based on documents on record, the Commission frames following issues for its consideration:
- a) Legitimacy of claims with reference to DPC wavier undertaking, Payment Plan and Limitation period.
 - b) Quantification of claim amount

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

12. Issue (A): Legitimacy of claims with reference to DPC wavier undertaking, Payment Plan and Limitation period.

- 12.1 The Petitioners submitted that they have received payments belatedly. For justifying legitimacy of the claims in context with law of limitation, the Petitioners put forward following two arguments:

- MSEDCL admitted its liability to pay DPC from May 2018 in December 2020 and requested the Petitioners to submit undertaking dated 4 December 2020. As per Section 18 of the Limitation Act, 1963, if the debtor makes an acknowledgment of their liability towards the creditor, during the limitation period, it gives rise to fresh limitation period to the creditor from the date of such acknowledgment. The limitation period of three (3) years recommenced on 4 December 2020 and concluded on 03 December 2023. The present Petitions have been filed within the deadline and hence claims are not time barred.
- MSEDCL in its payment plan promised release of payment due by March 2018 on or before March 2019. Therefore, MSEDCL acknowledged debt vide its Payment Plan and extended the limitation period till March 2022. Further, the Petitioners relied upon Order of the Hon'ble Supreme Court of India dated 10 January 2022 (in Suo Motu Writ Petition (Civil) No(s).3/2020). In said Order, it categorically held that the limitation period in all proceedings, from period 15 March 2020 till 28 February 2022 shall stand

excluded irrespective of the limitation prescribed under the general law or special laws whether condonable or not and shall commence from 01 March 2022. Consequently, the limitation period would resume from March 2022 up to March 2024 and therefore the present Petitions are not time barred.

- 12.2 MSEDCL submitted that the Hon'ble Supreme Court of India vide its Order dated 10 January 2022 has excluded period from 15 March 2020 till 28 February 2022 for the purpose of limitation in respect of all judicial or quasi-judicial proceedings. Consequent to such exclusion, the balance period of limitation would be available from 1 March 2022 is another 90 days i.e. up to 30 May 2022. Considering the said Order, the present Petitions ought to have been filed on or before 30 May 2022. Further if undertaking dated 4 December 2020 is revoked then as a natural corollary to the same no reliance can still be placed by the Petitioners on a non-existing document.
- 12.3 The Commission notes that MSEDCL in its argument categorically stated that the Petitioners have willingly submitted an unconditional DPC Waiver undertaking on 4 December 2020. The Petitioners have sent a Letter of revocation of undertaking after 2 years (on 16 November 2022) which is after receipt of agreed payments.
- 12.4 Considering rival contentions, the Commission notes that EPAs executed between the Petitioners and MSEDCL contain the provision with respect to waiver. Similar provision exists in all long-term EPAs, except reference to article number.

For brevity the provision in EPA furnished in Case No.212 of 2023 is reproduced as under:

“Section 20.04 Waiver:

*Failure to enforce any right or obligation by any Party with respect 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 right 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.**” [Emphasis Added]*

- 12.5 As per the above provision in EPA, any party can relinquish its rights under the contract by granting waiver in writing. Thus, EPA enables waiving of DPC claims.
- 12.6 The commission observes that the Petitioners in present proceedings urged that the DPC waiver undertaking should not be considered, as the payment has not been made within agreed time. However, Commission finds that it is an admitted fact that no time period is specifically mentioned in the undertaking. Similar issue of undertaking not having any time period for payment was deliberated and ruled by the Commission in its Order dated 12 January 2023 in Case No. 199 of 2018 & others (*Implementation of ATE's Judgment dated 6 October 2022 in Appeal No. 13 of 2019*) as follows:

“

19.3.1. The commission observes that MD in these proceedings urged that the DPC waiver undertaking should not be considered, while evaluating the claims as the payment has not been made within agreed time. However, Commission finds that it is an admitted fact that no time period is specifically mentioned in the undertaking. In the excel sheet computation (which is furnished subsequently) MD has included the impact of waiver of DPC for the period of May-2018 to June-2018. This is contradictory submission on part of MD to the undertaking given to MSEDCL.

19.3.2. Considering nature of undertaking read with provisions contained in Article 19 of WEPA, the Commission considers the waiver as legally valid arrangement between the contesting parties.”

- 12.7 Above ruling is squarely applicable in present matter. As no time period is mentioned in the undertaking and considering the fact that waiver is legally valid arrangement between the contesting parties, the Commission rules that the Petitioners are not eligible to claim DPC for May 2018 to March 2021 as per its own undertaking.
- 12.8 The Commission notes that from excel workings it is evident that the Petitioners have claimed DPC for the period of April-2018 till August-2023. As discussed above, DPC claims for May-2018 to March- 2021 needs to be excluded. Hence, in its computation which is provided in subsequent part of the Order, the Commission has considered DPC claims only for April-2018 and April-2021 to August 2023.
- 12.9 The Commission notes that Hon’ble Supreme Court vide its Judgment dated 16 October 2015 in the case of *AP Power Coordination 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.
- 12.10. 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 of 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 in November 2023. Accordingly, claims prior to November 2020 should have been barred by limitation. In present case, as stated in para 12.8 above, claims for April 2018 and April 2021 to August 2023 are being considered.
- 12.11 In normal circumstances, claims for April-2018 is time barred, but it needs to be tested in view of exemption granted by the Hon’ble Supreme Court Judgment dated 10 January 2022, whereby the period between 15 March 2020 till 28 February 2022 has been 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.”

From above it is evident that, for April-2018 claim the deadline of expiry of limitation period falls between 15 March 2020 till 28 February 2022. For such claims limitation period is extended by only 90 days from 1 March 2022 i.e. till 30 May 2022. As the Petitions have been filed in the month of November-2023, the claim for April-2018 is time barred.

12.12 Hence, DPC claims for the period of April 2021 to August 2023 are being considered in present matter.

13. Issue (B): Quantification of claim amount.

13.1. 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 ruled 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.

13.2. The Petitioners have claimed following Principal, DPC and Penal Interest on DPC (as on 30 September 2023):

Case No.	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
Principal Amount (in Rs.)	28,95,744	22,52,127	27,27,234	28,83,292	57,87,090	30,14,372	21,79,996
DPC (in Rs.)	41,46,033	36,35,000	47,63,950	44,64,159	61,31,712	39,17,622	38,87,020
Penal Interest on DPC (in Rs.)	28,07,657	23,53,647	31,81,454	29,39,565	28,60,333	25,61,289	25,16,401

Principal Payment

13.3. MSEDCL in its submission has submitted that it has settled following principal payments against invoices for month of June-2023, July-2023 and August-2023:

	Period Claim	Paid on	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
Principal Amount (after TDS Deduction)	June-2023	28.11.2023	10,39,275	7,67,273	10,75,854	10,50,100	16,54,939	10,82,577	7,37,703
	July-2023	02.01.2024	10,21,838	8,74,768**	8,81,167	10,21,838	23,15,106	10,67,963	8,41,166
	August-2023	28.02.2024	8,31,735	6,07,808	7,67,456	8,08,471	18,11,197	8,60,817	5,98,917
Total			28,92,848	22,49,849	27,24,477	28,80,409	57,81,242	30,11,357	21,77,786

**Paid on 17 May 2024.

13.4. The Commission notes that above payments have been settled by MSEDCL post filing of the present Petitions. Further, the Petitioners in their additional submission put forward additional principal amount claims calculated up to 31 May 2024. Details of the same are as below:

Particulars	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
Principle Amount Due	9,25,899	16,44,550	10,02,545	9,31,895	7,29,141	9,50,497	6,61,739

As above payments have been claimed subsequently and not part of the claim statement made in original Petitions. Hence, the Commission is not inclined to consider the same.

13.5. The Commission notes that principal payments claimed by the Petitioners in Petition and that settled by MSEDCL vary on account of deduction of TDS. Further, the Petitioners have not disputed the principal payments settled by the MSEDCL. Accordingly, the principal payment issue is settled.

DPC

13.6. The Commission notes that two aspects are necessary for computing DPC i.e. time delay in principal payment and applicable interest rate.

13.7. The Petitioners have claimed following DPC amounts:

Particulars	Period Claim	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
DPC (in Rs.)	April-2018 to August-2023	41,46,033	36,35,000	47,63,950	44,64,159	61,31,712	39,17,622	38,87,020

The Petitioners have bifurcated DPC claim in two (2) parts i.e. DPC on unpaid invoices prior to March 2018 and Post April 2018.

13.8. MSEDCL submitted that it has released the DPC as per Wind Payment Plan. Details of DPC paid by MSEDCL is as below:

	Period Claim	Paid on	212/2023	216/2023	217/2023	218/2023	219/2023	220/2023	223/2023
DPC Payment	Apr to Jun-2021	08.06.2022	1,54,507	1,04,029	1,82,622	1,69,912	2,38,246	1,58,917	99,295
	July-2021 to Sep-2021	06.09.2022	2,62,161.82	1,94,903	2,57,328	2,62,674	4,87,115	2,65,535	1,87,861
	Oct-2021 to Dec-2021	02.11.2022	77,910	1,07,581	76,276	84,624	1,82,036	86,541	97,102
	Balance DPC	02.05.2024	3,54,171	3,20,754	3,89,150	3,67,095	6,97,702	3,51,156	3,44,391

As per MSEDCL's calculation, as on date there is no outstanding DPC.

- 13.9. It is pertinent to note that in long term EPAs for Panchapatta and Satara locations, provision of DPC rate and credit period are different. Whereas, in short term EPA, no provision of DPC has been made. Details of the same are as below:

Sr.No.	Location		Credit period	Rate of DPC
1	Panchapatta	Long term EPA	45 days from receipt of invoice	2% above SBI Short term lending rate
		Short Term EPA	60 days from receipt of invoice	No provision
2	Satara	Long term EPA	60 days from receipt of invoice	1.25% per month

- 13.10. The Commission notes that this issue of payment of DPC under Short Term EPA/PPA has been decided in Order dated 17 August 2020 in Case No. 2 of 2020 (MSPL Ltd. Vs MSEDCL) as follows:

“

11.3 Thus, substantial outstanding principal amount has been paid by MSEDCL against STPPAs and only 2 months amount is pending now. However, there seems to be disagreement amongst the contracting parties on applicability of DPC under STPPAs. While MSPL Ltd has claimed late payment surcharge / DPC at the rate of 1.25% per month as per the provisions MERC Regulations, 2015 and RE Tariff Regulations, 2019, MSEDCL has opposed such contention on the ground that STPPAs executed with MSPL Ltd do not have clause for DPC payment. 11.4 The Commission notes that it is admitted fact that STPPA does not have clause relating to late payment surcharge / DPC for delayed payment. However, MSPL has relied upon MERC RE Tariff Regulations to claim such DPC. The Commission notes that MSEDCL's proposal of purchasing short term power from Wind generators whose EPA has been at Rs. 2.25/kWh for Group I projects and at Rs. 2.52/kWh for Group II to IV projects and the same was approved by the Commission in its Order dated 15 November 2017 in Case No. 155 of 2017. In that Order, while allowing proposal of MSEDCL, the Commission has made following observations on terms of EPA:

“7. MSEDCL has stated that it has already agreed to short-term procurement of Wind Energy, at Rs. 2.52 per unit, from 103 Group II Generators whose EPAs with

MSEDCL have expired but whose Projects have some remaining useful life. Several Group II and IV Generators have also approached MSEDCL for entering into fresh EPAs after the original EPA periods. MSEDCL has proposed to procure Wind Energy from them also at the same rate for short-term periods not less than 3 months. For Group I Projects, MSEDCL proposes to enter into short-term EPAs at Rs. 2.25 per unit. The quantum of such procurement is sought to be counted towards MSEDCL's non-Solar RPO. The Commission's findings on this proposal are as follows:

.....

4) Since the other provisions of the fresh EPAs entered or proposed to be entered into by MSEDCL have not been set out in its Petition, the Commission presumes that they are in consonance with the past stipulations of the Commission and the rulings of the Appellate Tribunal for Electricity.”

*Thus, while approving MSEDCL's proposal for short term procurement of Wind Power, the Commission noted that conditions of Short term EPAs need to be consonance with the past stipulations of the Commission and ruling of the APTEL. **Therefore, DPC which is integral part of earlier EPAs and RE Tariff Regulations, needs to be included in Short Term PPAs. Hence, the Commission directs MSEDCL to pay DPC for delayed payment of principal amount as per provisions of relevant applicable provisions of RE Tariff Regulations.**” [emphasis added]*

Thus, in above Order, the Commission has clearly ruled that short term EPA/PPAs which are being signed post expiry of generic tariff based long term EPAs should include provisions of DPC and accordingly allow levy of DPC even though no such specific clause is mentioned in the Short Term EPA/PPA.

13.11. While calculating the DPC liability, it is pertinent to note that 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 applicable in present case also. Accordingly for computing DPC claim in respect of projects at Panchapatta, the Commission has considered rate of SBI MCLR +2% as interest rate.

- 13.12. The Commission noted that MSEDCL has settled the partial DPC amount as per Payment plan timelines. Considering the impact of partial payment, the Commission has worked out unsettled DPC amount as below:

(In Rs.)

Case No.	DPC as calculated by the Commission (Without considering impact of MSEDCL payments)	DPC settled by MSEDCL	Unsettled DPC amount
212 of 2023	1028631	848749	179882
216 of 2023	864048	795663	68385
217 of 2023	1042505	905376	137129
218 of 2023	1039447	884305	155142
219 of 2023	1800777	1605099	195678
220 of 2023	984249	862149	122100
223 of 2023	746724	727267	19457

13.13. Difference in DPC amount is on account of impact of waiver undertaking, Interest rates as mentioned in Para 13.10 and consideration of administrative charges, as stipulated in EPAs.

Penal Interest on DPC

13.14. The Commission notes that the Petitioners have also claimed penal interest @1.25% per month on delayed DPC payment. The Petitioners have relied upon the Commission's Order 10 August 2016 in Case No.150 of 2015 for sufficing claim of penal interest.

13.15. 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.**”*

13.16. 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.

13.17. 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.”

13.18. The Commission notes that interest of 1.25% per month on LPS is not provided in the EPA. MSEDCL's practice of paying DPC after substantial time delay reduces time value of money. In past the Commission has allowed interest of 1.25% on unpaid DPC to various wind generators for compensating time value of money. Circumstances in present matters are identical to other Wind matters. Hence, the Commission allows interest of

1.25% per month on delayed payment of DPC. In case of excess payment, holding cost is also considered at same rate of 1.25% per month.

- 13.19. Such interest is computed post payment of principal amount for the period between date of principal payment and date of DPC payment. Unsettled amount of DPC is yet to be paid, hence for purpose of computation, end date is considered as 31 October 2024. Accordingly, interest on LPS is computed as follows:

Case No.	Penal Interest for delayed DPC payment (In Rs.)
212 of 2023	84248
216 of 2023	72060
217 of 2023	84779
218 of 2023	81151
219 of 2023	137279
220 of 2023	82944
223 of 2023	60118

- 13.20. Having quantify the claimed amount, on the enforceability, the Commission notes that Petitioners have stated that they cannot relied upon LPS Rules 2022 for recovery of dues as provision related to Letter of Credit or Escrow Account stipulated in the said Rules are not complied with. The Commission has dealt with similar contention in its Order dated 13 February 2023 in Case No. 134 of 2022 & 2 others as follows:

“

14.1 During the course of hearing, the Commission enquired with the Petitioners about provisions of LPS Rules, 2022 for ensuring recovery of amount due under the EPA/PPA.

14.2 In response to above query, the Petitioners have contended that the stipulations in LPS, 2022 cannot be applied in the present Petition. LPS Rules, 2022 provide that a generating company would lose its right to collect any late payment surcharge if a generator supplies power without the payment security mechanism or without advance payment. As the energy purchase agreements were entered before the notification of LPS Rules, 2022, the Petitioners have no security mechanism such as letter of credit backed by escrow arrangement and hence will not be able to avail any effective remedy under provisions of LPS Rules, 2022.

14.3 The Commission notes the difficulty cited by the Petitioners but opines that said LPS Rules 2022 have independent provision relating to Regulation of access to defaulting entities. Same is reproduced below for ready reference:

“7. Regulation of access to defaulting entities.-In case of non-payment of dues, by the distribution licensee or other user of transmission system, even after two and half months from presentation of bill by the generating company or transmission licensee or trading licensee, or in case of default in the payment of

instalments fixed under rule 5, the power supply to the defaulting entity shall be regulated as follows:-

(1) Short-term access, for sale and purchase of electricity including in the power exchange shall be regulated entirely:

Provided that the same shall be also applicable on already approved short-term access:

Provided further that the National Load Despatch Centre may, under exceptional circumstances for grid security, temporarily review the regulation of short-term access under this rule, and record the reasons for doing so, in writing.

(2) If, even one month after the regulation of the short-term access or if the dues have remained unpaid for three and a half months, apart from the regulation of the short-term access in its entirety, the long and medium-term access shall be regulated by Ten per cent.

(3) Reduction or withdrawal of long-term access and medium-term open access shall be in such manner that the quantum of reduction in drawl schedule increases progressively by Ten per cent for each month of default.

*(4) On payment of outstanding dues, the regulation of access under this rule shall end and it shall be restored at the earliest, but not later than two days.
.....”*

Thus, above quoted provision of LPS Rules 2022 is independent provision and generator like present Petitioners can avail such remedy as effective mechanism for ensuring recovery of their due amount.”

Above ruling is squarely applicable in present matter. Accordingly, Petitioners can avail remedy under LPS Rules 2022 for recovery of their due amount.

13.21. The Commission directs the Petitioners to raise invoice for approved amounts of DPC and Interest on delayed payment of DPC 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.

14. Hence, the following Order.

ORDER

- 1. Case Nos. 212, 216, 217, 218, 219, 220, 223 of 2023 are party allowed.**
- 2. The Petitioners are eligible for DPC and interest on delayed payment of DPC as follows:**


Case No.	Delayed Payment Charge (In Rs.)	Interest on Delayed payment of DPC (In Rs.)
212 of 2023	179882	84248
216 of 2023	68385	72060
217 of 2023	137129	84779
218 of 2023	155142	81151
219 of 2023	195678	137279
220 of 2023	122100	82944
223 of 2023	19457	60118

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

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

