

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13<sup>th</sup> Floor, Cuffe Parade, Mumbai 400005.**  
**Tel. 022 22163964/65/69 Fax 22163976**  
**Email: [mercindia@merc.gov.in](mailto:mercindia@merc.gov.in)**  
**Website: [www.merc.gov.in/www.mercindia.org.in](http://www.merc.gov.in/www.mercindia.org.in)**

**CASE No. 122 of 2015**

**In the matter of**

**Petition of Maharashtra State Electricity Distribution Co. Ltd. for amendment in the  
Case 1 Stage 1 Competitive Bidding PPAs with regard to Contracted Capacity and  
related provisions**

**Coram**

**Shri. Azeez M. Khan, Member**  
**Shri. Deepak Lad, Member**

Maharashtra State Electricity Distribution Co. Ltd.

Petitioner

V/s

Adani Power Maharashtra Ltd.  
JSW Energy Ltd.

.....Respondent No. 1  
.....Respondent No. 2

**Appearance**

For Petitioner:

Shri Ashok S. Chavan  
Shri. Paresh Bhagwat

For Respondent No. 1:  
For Respondent No. 2:

Shri. A. Mathur  
Adv. L. Vishwanadhan  
Shri.C.P.Tated

For Consumer Representative:

Shri Ashok Pendse, TBIA

## ORDER

**Date: 5 March, 2018**

Maharashtra State Electricity Distribution Co. Ltd.(MSEDCL) has filed a Petition on 4.9.2015, under Section 86 of the Electricity Act (EA), 2003 for amendment in the Power Purchase Agreements (PPAs) signed with two Generators pursuant to Case 1 Stage 1 competitive bidding with regard to the definitions of ‘Contracted Capacity’ and ‘Installed Capacity’.

2. The prayers of MSEDCL are as follows:-

- a) *“To admit the Petition as per provisions of the Section 86 (1) (b) (f) of the Electricity Act 2003 and Regulation 92,93,94 and 96 of MERC (Conduct of Business) Regulations 2004;*
- b) *To allow the Petitioner to modify the PPA dated 8<sup>th</sup> Sep 2008 with APML and 23<sup>rd</sup> Feb 2010 with JSW Energy Ltd.*
- c) *To allow Petitioner to amend and reduce Contracted Capacity in the PPA of APML (1320 MW) and JSW (300 MW) to Net Rated capacity (i.e. Installed Capacity – Auxiliary consumption as per applicable MERC norms) as 1234 MW i.e. 1320-86 MW and as 273 MW i.e. 300-27 MW respectively.*
- d) *To modify the clause 4.4.4 as per definition of Contracted Capacity;*
- e) *To allow MSEDCL to make the reduction in Contracted Capacity of APML (1320 MW) and JSW (300 MW) with retrospective effect*
- f) *To allow the Petitioner to calculate the capacity charges as per revised Contracted Capacity with retrospective effect and adjust the differential amount in future bills; ...”*

3. The Petition states as follows:

3.1. In 2007, MSEDCL initiated a Case 1 Stage 1 competitive bidding process for procurement of 2000 MW power. However, Case 1 Standard Bidding Documents (SBDs) had not been published by the Ministry of Power (MoP), Govt. of India (GoI) at that time. Hence, the Bidding Documents were prepared on the basis of the MoP’s Case 2 SBDs which were available, with some modifications. These were approved by the Commission vide Order dated 24.1.2008 in Case No. 39 of 2007 with some changes.

3.2. Based on these modified Bidding Documents approved by the Commission, MSEDCL initiated a bidding process for purchase of 2000 MW ( $\pm 20\%$ ) under Case 1 Stage 1. The Bidding Documents comprising the Request for Proposal (RFP) and PPA as approved by the Commission were advertised accordingly. The process had

started earlier in 2006 with the issue of the Request for Qualification (RFQ), but the evaluation of financial proposals was concluded in 2008.

- 3.3. After opening and evaluation of the bids, a High Powered Committee involving the Government of Maharashtra (GoM) was formed to negotiate the tariff with the three successful bidders, namely, Adani Power Maharashtra Ltd. (APML), Lanco Vidarbha Thermal Power Ltd. (LVTPL) and JSW Energy Ltd. (JSWEL). Based on the report of the Negotiating Committee and the order of the GoM, PPAs were signed with JSWEL, APML and LVTPL for 1320 MW, 300 MW and 680 MW, respectively. The details are as follows:

Sr. No.	Bidder	PPA quantum (MW)	PPA date	Levelised tariff (Rs./kWh)	Units specified in PPA	Unit configuration
1.	APML	1320	8 <sup>th</sup> Sep 2008	2.64	Unit 2 and 3	2*660 MW
2.	JSWEL	300	23 <sup>rd</sup> Feb 2010	2.71	Unit 1	300 MW
3.	LVTPL	680	25 <sup>th</sup> Sep 2008	2.71	Unit 1 and 2	2*340 MW

- 3.4. The PPAs were signed exactly as per the published Bidding Documents made available to the public and approved by Commission, and no deviation or changes were made in the Documents.
- 3.5. The Commission has adopted the Tariffs under 63 of the EA, 2003 vide Orders dated 27.11.2009 (Case No.39 of 2009) and 19.8.2013 (Case No. 24 of 2013).
- 3.6. The supply from APML and JSWEL has commenced. However, LVTPL failed to commission its Project as per the Scheduled Commencement of Operation Date (SCOD).
- 3.7. As per the PPA provisions, the Contracted Capacity is considered as 1320 MW and 300 MW for APML and JSWEL, respectively, and Capacity Charges are paid accordingly from the COD.
- 3.8. The revised Bid Documents were in compliance with the Competitive Bidding Guidelines of the MoP and the commercial principles enumerated in the Case 2 SBD were followed, except those that were specific to Case 1 bidding. SBDs with the required modifications were approved by the Commission vide Order dated 24.1.2008 in Case No. 38 of 2007.
- 3.9. MSEDCL has entered into PPAs with the Respondents, as approved by the Commission. However, some provisions in the PPAs which were in line with the then available Case 2 SBDs and adopted in the Case 1 PPAs have contradictions. In the light of MSEDCL's actions as per the PPA provisions and the Comptroller and

Auditor General (CAG)'s Audit observations, MSEDCL seeks clarification and revision of the relevant provisions by the Commission under Section 86 (1) (b), (f) of the EA, 2003 and Regulations 92 to 94 and 96 of the MERC (Conduct of Business) Regulations, 2004.

- 3.10. As per the RFP, the contracted quantum is Generating Unit-based. Hence, the power is to be supplied by the Unit specified in the bids by the bidders. The basic Gross Rated Capacity of the respective Units was considered for determining the Contracted Capacity. However, in the provisions of the PPAs, an ambiguity has been raised in relation to the understanding of the terms "Contracted Capacity", "Installed Capacity" and the billing provisions. As per the PPAs, Contracted Capacity is rated as the Net Capacity at the interconnection point:

PPA with APML dated 8.9.2008 for 1320 MW-

*"Contracted Capacity"- "Means (i) for the second unit 660MW and; (ii) for the third Unit 660MW, rated net capacity at the interconnection point offered to and accepted the procurer, and in relation to the power Station as a whole means 1320MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, or such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement (i.e. derating capacity), where the rated capacity offered to and accepted by the procurer could be the entire rated net capacity of the unit or a portion thereof;"*

PPA with JSW dated 23.2.2010 for 300 MW-

*"Contracted Capacity" - means (i) for the first unit 300MW rated net capacity at the interconnection point offered to and accepted the procurer, and in relation to the power Station as a whole means 300MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, or such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement, where the rated capacity offered to and accepted by the procurer could be the entire rated net capacity of the unit or a portion thereof;*

*...6.3.4 if a unit's Tested Capacity after the most recent Performance Test mentioned in Article 6.3.3 has been conducted, is less than its Contracted Capacity as existing on the Effective Date, the Unit shall be de-rated with the following consequences in each case with effect from the date of completion of such most recent test :*

*1) The Unit's Contracted Capacity shall be reduced to its Tested Capacity at the most recent Performance Test.*

*2) The quoted Non Escalable Capacity Charge (in Rs./kWh) shall be reduced in the event Tested Capacity is less than 95% of its Contracted Capacity as existing on Effective Date.*

3) *The Seller shall not be permitted to declare the Available Capacity of the Unit at a level greater than its Tested Capacity.*

4) *The Availability Factor of the derated Unit shall be calculated by reference to the reduced Contracted Capacity.*

5) *The Capital Cost and each element of the Capital Structure Schedule shall be reduced in proportion.”*

3.11. Incentive payable:

The Capacity Charges are payable upto 80% (normative Availability) of the Contracted Capacity as per the PPAs, and incentive is payable above tha:

PPA with APML dated 8.9.2008 for 1320 MW-

*“Schedule 6: Tariff*

*1.2.4 Contract Year Energy Incentive Payment*

*If and to the extent the Availability in a Contract Year exceeds eighty percent (80%), an incentive at the rate of 40% of the Quoted Non Escalable Capacity Charges (in Rs. /kWh) for such contracted Year mentioned in Schedule 10 subject to a maximum of 25 paise/kwh, shall be allowed on the energy (in kwh) corresponding to the availability in excess of eighty percent (80%).”*

PPA with JSW dated 23.2.2010 for 300 MW-

*“Schedule 6: Tariff*

*1.2.4 Contract Year Energy Incentive Payment*

*If and to the extent the Availability in a Contract Year exceeds eighty percent (80%), an incentive at the rate of 40% of the Quoted Non Escalable Capacity Charges (in Rs. /kWh) for such contracted Year mentioned in Schedule 10 subject to a maximum of 25 paise/kwh, shall be allowed on the energy (in kwh) corresponding to the availability in excess of eighty percent (80%).”*

3.12. Unit’s Auxiliary load requirements (for both PPAs):

Article 4.4 provides that the Seller shall supply power to the extent of Contracted Capacity to MSEDCL. However, the Seller is allowed to use the Unit’s Auxiliary load from out of the Contracted Capacity, which has resulted in ambiguity on the Contracted Capacity to be supplied to MSEDCL. Article 4.4 of the PPA reads as follows:

*“The Seller shall not itself use any of the electricity generated by the unit, to the extent of its contracted capacity during the term of this Agreement, except for the purpose of meeting the Unit’s auxiliary load requirements, as per the norms laid down by the MERC, load requirements of the captive coal mine as per applicable Law (if applicable) and housing colony for the staff.”*

- 3.13. MSEDCL, being a Government Company, is subject to audit by Government Auditors. The Government Auditors have conducted a Performance Audit of the PPAs signed by MSEDCL with Independent Power Producers (IPPs). In the Audit, the Government Auditors have made the following observation on the Contracted Capacity under Case 1 Stage 1:

*“In the first two long term PPAs executed (September 2008 and February 2010) with Adani Power Maharashtra Limited (APML) for Units 2 and 3 and JSW Energy (Ratnagiri) Limited (JSWERL) for Unit 1, gross rated capacity of the respective power plants were considered for determining the contracted capacity. Whereas, in the other eight long term PPAs, the contracted capacity was determined on the basis of the net rated capacity of the Units after reckoning their auxiliary consumption. Since the quantum of power generated but consumed within the Unit was not available for sale, declaration of contracted capacity by considering their gross capacity in the first two PPAs was not found to be appropriate.*

*After reckoning the normative auxiliary consumption of nine per cent prescribed in the Tariff Regulations, net rated capacity of the units available for contractual obligation worked out to 273 MW in respect of unit 1 of JSWERL and to 600.6 MW each in respect of Unit 2 and 3 of APML as against 300 MW and 660 MW each considered in the respective PPAs as contracted capacity at delivery point. We observed that declaration of contracted capacity on the gross rated capacity of the plants without reckoning their auxiliary consumption had resulted in excess payment of capacity charges, which, as per the contractual terms, was payable only up to 85 and 80 per cent of the contracted capacity respectively, being the normative availability. For the quantum of power supplied beyond the normative availability, the supplier was entitled to receive incentive at a lower rate in place of the capacity charges.*

*The excess amount of capacity charges so paid to JSWERL for the Unit 1 power supplied between September 2010 and 31 March 2013 worked out to Rs.31.12 crore. In respect of APML, the supplies commenced only in March and June 2013 from Unit 2 and Unit 3 respectively and hence the excess payment could not be ascertained. Unless the contractual terms as to the contracted capacity were amended to reflect the net rated capacity of the respective plants, such excess payment towards the capacity charges could not be avoided in future.”*

*In case of JSW, the Contracted Capacity is 300 MW and thus Normative Availability is 240 MW (80%). At present, Capacity Charges as quoted is being paid for actual availability up to 240 MW and thereafter incentive at*

*Rs.0.25/ kWh. Considering Aux. consumption the net capacity of unit will be 273 MW. Thus at any point of time JSW can supply power maximum up to 273MW only out of scheduled quantity of 300MW. Had the PPA been executed for Net Rated Capacity, Contracted Capacity would be 273 MW (9% Normative Auxiliary Consumption) and Normative Availability (80%) would be 218 MW and thus incentive would have been applicable after 218 MW as against presently applicable after 240 MW. Thus, for this 22 MW (240 MW – 218 MW) capacity charge @ Rs.1.059 /unit in being paid as against incentive of Rs.0.25/kwh. According to Govt. Audit, the excess amount of Capacity Charges so paid to JSW for the Unit 1 power supplied between September 2010 and 31 March 2013 worked out to Rs.31.12 Crore.*

*The similar impact is seen in case of Adani Power Maharashtra Ltd. also.”*

- 3.14. The Government Auditors are also of the view that, unless the contractual terms as to the Contracted Capacity are amended to reflect the Net Rated Capacity of the respective Plants, such excess payment towards the incremental incentive payment will continue.
- 3.15. MSEDCL has replied to the Government Auditor that the PPAs are signed exactly as per the Bidding Documents published and made available to public. No deviation or subsequent changes were made. The Bidding Documents comprising the RfP and PPA as published by MoP and approved by the Commission have been used and advertised accordingly. MSEDCL’s reply to the Auditor is reproduced below:

*“At that time Case 1 bidding documents were not published by MoP, however the Case 2 document was published. Based on case 2 documents, the case 1 documents with some modifications were prepared and submitted to MERC for approval. Accordingly, bidding process was initiated under case 1 stage 1 for 2000 MW (-20% to +30%) as per the guidelines of MoP and as approved by MERC. Accordingly, PPAs have been signed with JSW and Adani for the approved quantum.*

*The Govt. Audit Team has stated out that, the declaration of contracted capacity on the gross rated capacity of the plants without reckoning their auxiliary consumption had resulted in excess payment of capacity charges, which, as per the contractual terms, was payable only up to 80 per cent of the contracted capacity respectively, being the normative availability and above that incentive is payable.*

*In this context it is to state that, as per PPA, in case availability for a contract year is less than 75%, the seller is liable to pay penalty. Thus, the seller is liable to pay the penalty at the earlier stage i.e. for the quantum supplied less than 225 MW in case of JSW and 990 MW in case of APML. Accordingly, MSEDCL has deducted penalty from JSW for the period 2010-11 and 2011-12.*

*However, as pointed out by the Auditor regarding fixation of contracted*

*capacity, the matter will be referred to MERC as the Bid Documents and PPA have been approved by MERC. As per decision of the MERC, appropriate action will be initiated.”*

3.16. However, in the CAG Audit Report 2012-13, the Auditors have re-iterated the same issue and made the following observation:

*“The Management replied that they would be approaching MERC for clarification regarding fixation of contracted capacity as the Bid Documents and PPA were approved by MERC and will take suitable action as per the directions of the MERC. The reply was not acceptable since contracted capacity was the net capacity at delivery point as per the Bid Document.”*

3.17. Considering the above provisions of the PPA, it is interpreted that the Contracted Capacity of 1320 MW for APML and 300 MW for JSWEL is at the interconnection point, but the same Capacity is the Installed Capacity of the Unit also.

3.18. As per Article 4.4, the Seller is allowed to meet Auxiliary Consumption from the Contracted Capacity. In view of the Audit observation, the declaration of Contracted Capacity by considering the Gross Capacity was not found to be appropriate and the Net Contracted Capacity at the interconnection point needs to be reduced to the extent of Auxiliary Consumption.

3.19. In view of the above, MSEDCL has calculated the Net Capacity as shown in the Table below. Accordingly, the Contracted Capacity signed in the PPAs needs to be reduced by the Auxiliary Consumption.

Sr.	Name	PPA (MW)	Gross Capacity (MW)	Auxiliary Consumption as per MERC MYT Regulations, 2011	Net Capacity (MW)
1.	APML	1320	660 MW * 2	6.5% for 660 MW * 2 = 86 MW	1234
2.	JSWEL	300	300 MW	9% for 300 MW * 1 = 27 MW	273
<b>3.</b>	<b>Total</b>	<b>1620</b>	<b>1620</b>	<b>113 MW</b>	<b>1507</b>

3.20. Consideration of Gross Rated Capacity of the respective Power Plants as the Contracted Capacity is resulting in excess payment of Capacity Charges. The Capacity Charges are payable upto 80% (normative Availability) of the Contracted Capacity as per the PPAs, and incentive is payable above that.

3.21. Thus, the threshold for payment of incentive is being reached at 80% of Gross Rated Capacity rather than at Net Rated Capacity (after Auxiliary Consumption). Also, the declaration of Contracted Capacity on the Gross Rated Capacity of the Plants, without reckoning their Auxiliary Consumption, will have impact on Capacity Charges as well as incentive.

- 3.22. Due to consideration of ‘Contracted Capacity’ as Gross Rated Capacity rather than Net Rated Capacity, the threshold limit of applicability of incentive charges and Capacity Charges changes, as outlined in the following Table:

	<b>Contracted Capacity</b>	<b>Incentive and Capacity Charges threshold</b>
<b>For APML</b>		
Gross Rated Capacity = Contracted Capacity	1320 MW	1056 MW (80% of 1320)
Net Rated Capacity = Contracted Capacity	1234 MW	987 MW (80% of 1234)
<b>Difference</b>	<b>86 MW</b>	<b>69 MW</b>
<b>For JSW</b>		
Gross Rated Capacity = Contracted Capacity	300 MW	240 MW (80% of 300)
Net Rated Capacity = Contracted Capacity	273 MW	218 MW (80% of 273)
<b>Difference</b>	<b>27 MW</b>	<b>22 MW</b>

- 3.23. MSEDCL is paying Capacity Charges as per the Contracted Capacity mentioned in the PPAs. However, considering Auxiliary Consumption, the Capacity Charges can be higher, as stated by the CAG, and hence needs to be corrected. If it is not corrected, MSEDCL and its consumers may continue to pay this erroneous incentive / Capacity Charges perpetually.
- 3.24. In its bid, JSWEL had offered power from one Unit with Rated Capacity of 300 MW and the same Contracted Capacity of 300 MW. Accordingly, PPA was executed for 300 MW from Unit 1 of JSWEL’s Ratnagiri (Jaigad) Thermal Power Station (TPS). Similarly, APML had offered power from Units 1, 2 and 3 (of its Tiroda TPS) with rated capacity of 110, 660 and 660 MW respectively and the same Contracted Capacity for each, with three separate price bids. As per the bids and subsequent negotiations with APML, PPA was signed for 1320 MW for Units 2 and 3.
- 3.25. As per Article 6.3 of the PPAs, an Independent Engineer has certified that the tested capacity of the Units of JSW and APML is not less than 95% of their Contracted Capacity through a trial run of 72 hrs.
- 3.26. As per the PPAs, the Net Capacity means the Unit-wise Rated Net Capacity at the interconnection point offered to and accepted by the Procurer. Since the Installed Capacities in the relevant PPAs are equal to the Net Capacity, considering the Auxiliary Consumption the same is not possible.
- 3.27. The PPAs under Case 1 Stage 1 are executed for Rated (Gross) Capacity, and the PPAs under Case 1 Stage 2 are executed for Net Capacity (after deducting Auxiliary

Consumption), which has resulted in ambiguity between the respective PPA provisions.

- 3.28. The contradictory provisions in the PPAs, whereby the definition states the Contracted Net Capacity at the interconnection point and Article 4.4.4 states that the Seller is allowed to meet Auxiliary Consumption from the Contracted Capacity, results in more confusion in relation to the calculation of the tariff and billing matters and, therefore, this anomaly is required to be resolved.
- 3.29. Further, this anomaly results in excess payment of Capacity Charges, as pointed out by the Government Auditors, whereby the Capacity Charges for the month are paid on net energy but the actual Availability percentage is calculated on Contracted Capacity, i.e. Gross Capacity. Thus, the Normative Availability units are more when calculated on Gross Capacity than in the case of Net Capacity. The fixed charges recovery stops at 80% actual Availability, and above that incentive is calculated at a later stage.
- 3.30. Therefore, the Contracted Capacity needs to be reduced to the extent of Auxiliary Consumption and, accordingly Article 4.4. of PPA needs to be modified as under –

*“The Seller shall not itself use any of the electricity generated by the unit, to the extent of its contracted capacity during the term of this Agreement.”*

- 3.31. On the above facts, MSEDCL seeks that the Commission remove the difficulties being faced. The Commission has jurisdiction and it is within the vested powers of the Commission under the EA, 2003 to remove the difficulties. The Commission is empowered to issue orders in the matter. The following provisions of the EA, 2003 and MERC (Conduct of Business) Regulations, 2004 empower the Commission.
- 3.32. As per Section 86 (1) (b) and (f) of the EA, 2003, the Commission can address the issues as below:

*“(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;*

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

- 3.33. Regulations 92, 93 and 94 of the MERC (Conduct of Business) Regulations, 2004 provide for saving of inherent powers of the Commission:

*“92. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process*

*of the Commission.*

*93. Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these Regulations including summary procedures, if the Commission, in view of the special circumstance of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for so dealing with such a matter or class of matters.*

*94. Nothing in these Regulations shall bar the Commission to deal with any matter or exercise any power under the Act for which no regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit.”*

4. At the hearing held on 11.2.2016:
  - 4.1. MSEDCL requested the Commission to keep the matter on hold as it would try to resolve the issue in discussions with the Respondents. A similar request was also made by APML vide its letter dated 10.2.2016. The Respondents agreed to the suggestion of MSEDCL for discussion.
  - 4.2. Smt. Ashwini Chitnis of Prayas(Energy Group (‘Prayas’), an Authorised Consumer Representative, sought the following from MSEDCL:
    1. Complete Petition,
    2. Comparison of Clauses in all the PPAs MSEDCL has signed under Case 1, Stage 1 and Case1, Stage 2, which deal with Capacity in all its forms such as Installed Capacity, Contracted Capacity, etc, which have an impact on the calculation of Capacity Charge.
    3. Details of Case 1- Stage 1 and Case 1- Stage 2 PPAs, and
    4. PPA wise-Generation, and computation of Capacity Charge and Energy Charge.
  - 4.3. Dr. Ashok Pendse of Thane-Belapur Industries Association (TBIA), an Authorised Consumer Representative, stated that, due to change in Availability Factor, there would be a change in computation of the Capacity Charges.
  - 4.4. The Commission asked whether the CAG had been apprised by MSEDCL regarding the background and the material relating to this matter. The SBDs were issued by GoI under Case 2, which were modified to Case 1 through a quasi-judicial process and bidders have bid based on the Documents made available to them.
  - 4.5. The Commission asked MSEDCL to submit within two weeks the details suggested by Prayas, including the actual payments made.

- 4.6. The Commission gave a month's time to the Parties for discussion, following which MSEDCL should revert to the Commission. MSEDCL should submit its say as to whether it would be prudent for the Commission to re-open the PPAs at this stage. MSEDCL also needs to study the pros and cons in case the PPA Clauses are changed. It should also provide the complete Petition to the Consumer Representatives and Respondents.
5. On 15.3.2016, MSEDCL submitted the documents and details sought at the hearing.
6. Vide its submission dated 9.12.2016, JSWEL stated as follows:
- 6.1. The Petition seeks unilateral amendment of the long term PPA dated 23.02.2010 for a Contracted Capacity of 300 MW. MSEDCL has accepted the position that
- (i) the contracted quantum of power as stated in the PPA is 300 MW;
  - (ii) the Bidding Documents and the PPA have been approved by the Commission finding that all requirements under Section 63 of the EA, 2003 and the provisions of the Competitive Bidding Guidelines have been complied with, way back on 27.11.2009;
  - (iii) since inception, the understanding of both Parties to the PPA as well as the Commission has always been that the Contracted Capacity under the PPA is 300 MW; and
  - (iv) the Parties have all along acted upon the understanding that the Contracted Capacity under the PPA is 300 MW and, on this basis, JSWEL has even been penalised.
- 6.2. Despite having accepted and acted upon the mutually agreed and Commission-approved PPA, MSEDCL, seemingly with reference to an Audit objection and its own reply to it, has approached the Commission through this Petition inter-alia seeking a unilateral amendment to the Contracted Capacity from 300 MW to 273 MW, with retrospective effect. The Petition appears to be solely driven by MSEDCL's own misconceived reply to the Government Auditor, rather than any illegality or non-compliance with the provisions of the EA, 2003 and, therefore, the Petition deserves to be dismissed in-limine.
- 6.3. The Petition is not maintainable under any of the provisions of the EA, 2003 and, as such, deserves to be dismissed at the threshold. An Audit objection and the unilateral and misconceived reply thereto by MSEDCL cannot confer jurisdiction on the Commission to amend a fundamental commercial term of the PPA in the absence of the consent of JSWEL. The invocation of Section 86(1)(b) and (f) is also flawed as MSEDCL's case is of a unilateral desire to have the PPA amended and not that of a dispute between the Generating Company and the Distribution Licensee. Similarly, the inherent powers of the Commission have been invoked erroneously as the inherent powers cannot be exercised in contravention of the provisions or outside the ambit of

the EA, 2003. Further, and without prejudice, the exercise of inherent powers can only be to meet the ends of justice, and not to sub-serve the unilateral commercial interests of one of the Parties to the Contract.

- 6.4. MSEDCL knowingly entered into the PPA for a Contracted Capacity of 300 MW, given the situation of acute power shortage in the State at that time. MSEDCL was aware that the nameplate/Installed Capacity of the Unit was 300 MW and yet consciously entered into the PPA for supply of 300 MW as Contracted Capacity. This was so as MSEDCL was all along aware that the Unit could run above its name plate capacity; and that JSWELTPS has other Units also - which factors could subsume the effect of the Auxiliary Consumption of the contracted Unit. Acknowledging this operational flexibility of JSWEL, MSEDCL contracted a Net Capacity of 300 MW. Now when the power situation in the State has improved, MSEDCL unilaterally seeks to have the Contracted Capacity of 300 MW reduced to the extent of normative Auxiliary Consumption retrospectively, terming it as an ambiguity and hence effectively asking the Commission to unilaterally re-write the PPA. There is no ambiguity in the PPA as regards the Contracted Capacity of 300 MW and/or the calculation of Availability, payment of Capacity Charges and incentive based thereon. The Petition has been filed with oblique motives and hence deserves to be dismissed at the threshold.
- 6.5. Assuming, without admitting, for the sake of argument that the amendment proposed by MSEDCL were to be permitted, the entire commercials of the PPA would have to be re-worked so as to ensure that there is no shortfall in recovery of Capacity Charges by JSWEL. Further, past and closed transactions would have to be re-opened, in view of the retrospective amendment sought. The jurisdiction of the Commission to undertake such an exercise after 6-7 years of approving the Bidding Documents and the PPA and finding that all requirements under Section 63 and the provisions of the Competitive Bidding Guidelines have been complied with, is not sustainable.
- 6.6. Article 18.1 of the PPA provides for amendment upon the mutual written agreement of the Parties and seeking approval of the Commission where necessary. JSWEL does not accept MSEDCL's unilateral right to amend the PPA. If the Commission aids MSEDCL in carrying out such a unilateral and illegal amendment, it would be unilaterally replacing JSWEL's bid to supply Net Capacity of 300 MW with the obligation to supply only 273 MW Net Capacity. Such a course is wholly impermissible and the Commission has no power to do so.
- 6.7. The Government Auditor's observations are an internal matter of MSEDCL to deal with and JSWEL does not admit the correctness of the observations made by the Government Auditor. In addition, the PPA has not only been approved by the Commission, the tariff has also been negotiated by the High Powered Committee of the Government of Maharashtra. MSEDCL itself presented the PPA before the State Commission for approval and did not mention or bring up any contradiction in the

PPA prior to acceptance of JSWEL's bid. Further, relying on the representation of MSEDCL and the provisions of the PPA, JSWEL provided a bid which was accepted and supply of 300 MW power was commenced. It is now wholly belated and misconceived on the part of MSEDCL to seek to unilaterally amend the PPA in complete disregard of the provisions of the EA, 2003, the Indian Contract Act and Article 18.1 of the PPA.

- 6.8. The interpretation placed by MSEDCL on the provisions of the PPA is incorrect and misleading. The PPA provides for an Installed Capacity as is evident from a prima facie reading of the PPA. The same is 300 MW in relation to JSWEL. Admittedly, there is no dispute with respect to it. The Contracted Capacity forms the basis of the PPA and the provisions in relation to tariff of the PPA. It is on the basis of this Contracted Capacity that recovery of Capacity Charges and the incentives are to be and have been calculated, and paid to JSWEL. Furthermore, Article 4.4.4 of the PPA, which is a provision relating to Unit operation, in fact prohibits JSWEL from using any electricity generated by the Unit to the extent of its Contracted Capacity, clearly indicating the intention and the commitment to deliver a Contracted Capacity of 300 MW to MSEDCL as paramount. The exception in Article 4.4.4 which permits the Unit's generation to be used for Auxiliary Consumption cannot be read so as to curtail the Contracted Capacity or to limit the prohibition contained in the main part of Article 4.4.4. This exception is merely an enabling provision relevant for Unit operation, and cannot be read to imply curtailment of Contracted Capacity.
- 6.9. MSEDCL's purchase of 300 MW power from JSWEL is governed by the specific provisions of the mutually agreed terms of the approved PPA; and the terms of any other PPA entered into by MSEDCL cannot have any bearing on this specific PPA. Without prejudice, the opinion of the Government Auditor may be taken into consideration only for any future PPAs that the audited entity may enter into. Each time an audit objection is raised, MSEDCL cannot be allowed to unilaterally approach the Commission seeking amendment of the terms of the PPA, in complete disregard of the provisions of the EA, 2003, the Indian Contract Act and the PPA. It is, therefore, reiterated that the Petition has been filed without any legal basis and there is no provision under law that permits such a Petition to be entertained. The Petition appears to be solely driven by MSEDCL's own misconceived reply to the Government Auditor and not any illegality or non-compliance with the provisions of the EA, 2002 and, therefore, the Petition deserves to be dismissed.
- 6.10. MSEDCL's conduct in compliance with the PPA for the past 6-7 years amply demonstrates that the interpretation now sought to be put on Article 4.4.4 is illusory, without any basis and arbitrary. MSEDCL is trying to create a dispute between the parties by changing its interpretation of the PPA solely on the basis of adverse comments received from its own Auditor. The entire PPA is based on the bid to supply Net Capacity of 300 MW. Merely because MSEDCL now believes that the interpretation should be changed and that MSEDCL is not liable to pay the charges

that it has been paying until now cannot become the basis to unilaterally amend the PPA.

- 6.11. MSEDCL has not only approached this Commission for reduction in the Contracted Capacity but has also sought the charges to be adjusted and the reduced Contracted Capacity to be made retrospectively effective. Allowing such prayer would not only be inequitable and unjust but would also be contrary to settled principles of law. There is nothing in the PPA, the Bid Documents or the EA, 2003 and the Regulations that permits such a retrospective amendment. Any direction to adjust the charges already paid under the PPA with retrospective effect would require a clear and unambiguous enabling provision, which is not present in the instant case.
  - 6.12. Without prejudice to the above and without admitting the merits of MSEDCL's claim, if the Commission finds any merit in MSEDCL's claim and determines that it has the power and jurisdiction to direct a unilateral re-writing of the PPA, then JSWEL must be allowed to recover the entire fixed cost for the 300 MW Unit from the revised Contracted Capacity (i.e. 273 MW), and cannot be kept bound by the same quoted Capacity Charge for the reduced Contracted Capacity of 273 MW. Since JSWEL quoted Capacity Charges based on a Contracted Capacity of 300 MW, any direction to reduce it to 273 MW must be compensated by the Commission with a suitable adjustment in the Capacity Charges such that JSWEL recovers the entire fixed cost from the revised Contracted Capacity of 273 MW.
7. At the hearing held on 15.12.2016:
    - 7.1. JSWEL stated that the PPA is between two Parties and no dispute has arisen between them as per the contract. MSEDCL is trying to rewrite a new contract which is on different terms. JSWEL also cited the Appellate Tribunal for Electricity (APTEL) Judgment dated 2 June, 2006 in Appeal Nos. 1, etc. of 2005 regarding whether a Regulatory Commission could alter or change the PPA entered into between a Developer and a Licensee.
    - 7.2. The Commission asked JSWEL about the generation capacity of the Plant and present tie-up of the Generator. JSWEL stated that Unit 1 is dedicated to MSEDCL, Unit 2 is a Merchant Power Plant and Units 3 and 4 are operating as Captive Power Plants.
    - 7.3. The Commission enquired whether JSWEL has provided the Net Capacity Contracted at the interconnection point to MSEDCL. In case other Units are under outage, how would JSWEL make up the Auxiliary Consumption in the event of MSEDCL requisitioning the entire Contracted Capacity? JSWEL stated that it would abide by the penalty clause in case the supply is below the Normative Availability as provided in the PPA. It also stated that the Normative Availability as envisaged in the PPA is at the Delivery Point on a Contract Year basis.

- 7.4. APML stated that the entire Capacity of its Tiroda TPS is tied-up with MSEDCL. With an Auxiliary Consumption of 6.5 %, the Net Generation Capacity for the entire Plant is 3085 MW, which is also the Capacity contracted with MSEDCL.
- 7.5. JSWEL and APML also stated that they have provided power at the interconnection point upto the Contacted Capacity.
- 7.6. The Commission asked MSEDCL for the provision of the PPA under which it has approached it for modification of the PPAs, and whether all the PPAs have similar definition of the Contracted Capacity. MSEDCL responded that it has come under the 'Removal of Difficulty' clause for modification of the PPA. The PPAs signed with APML and JSWEL are Unit-specific. The Case 1 Stage 1 PPAs have a different definition of Contracted Capacity. At the time of Competitive Bidding of Case 1, Stage 1, the SBDs for Case 1 were not available. Therefore, MSEDCL adopted the definition and Bid Documents of the SBD of Case 2 with some deviations which were approved by the Commission. Later, the SBD of Case 1 were notified when MSEDCL came with a tender for Case 1 Stage 2. The Contracted Capacity definitions were changed in the SBD of Case 1.
- 7.7. Dr. Ashok Pendse of TBIA stated that, after the Central Sector Generating Stations, in the Merit Order Despatch (MOD) the contracted JSWEL Unit is the first to be despatched.
- 7.8. The Commission asked APML to file its Reply in a week. JSWEL and MSEDCL may also submit their further say, if any, within a week. JSWEL should also indicate how it would be able to supply the Contracted Capacity to MSEDCL if all its remaining Units are fully tied up with other buyers.
8. In its Reply dated 21.12. 2016, APML has stated as follows:
  - 8.1. The concern of MSEDCL regarding such ambiguity came to APML's knowledge only upon receipt of the Notice dated 19.01.2016 from the Commission intimating the date of hearing in the matter. Upon receipt of the Notice, APML vide its letter dated 27.01.2016 requested MSEDCL to hold a meeting with APML to arrive at an amicable solution before approaching the Commission, as also envisaged under Article 17.2 of the PPA, and that the Commission could be approached thereafter if required.
  - 8.2. As directed at the hearing held on 11.02.2016, meetings were held between MSEDCL and APML on 18.03.2016, 19.03.2016 and 30.03.2016. However, they did not result in any fruitful mutual solution.

8.3. The case of MSEDCL for reduction of Contracted Capacity under the PPA dated 08.09.2008 has no merit and the Petition deserves to be dismissed in the light of the following broad reasons:

1) APML is capable of supplying the entire 1320 MW capacity under the PPAs. The Net Capacity of Tiroda TPS, excluding Auxiliary Consumption, is 3085 MW, which is equal to the sum of the Contracted Capacities of all four PPAs with MSEDCL, i.e., 1320 MW + 1200 MW + 125 MW + 440 MW. As long as any of the Units 1, 4 and 5 is in operation, the Auxiliary Consumption of Units 2 and 3 shall be met from Units 1, 4 and 5, and the gross generation of Units 2 and 3 shall be considered as supplied against the 1320 MW PPAs. Necessary metering arrangement for recording the gross generation of Units 2 and 3 would be undertaken by APML as per the Maharashtra State Load Despatch Centre (MSLDC) / State Transmission Utility (STU)/MSEDCL requirements. In fact, APML has supplied and MSEDCL has availed 1320 MW many times, and hence there is no requirement for reduction in Contracted Capacity. MSEDCL has paid Capacity Charges corresponding to 1320 MW. Incentive and/or Penalty computations were made considering 1320 MW as Contracted Capacity.

2) Article 19 of the PPA dated 08.09.2008 provides for supply of power from alternate sources also without any cap on the maximum duration for which it can be supplied. Without prejudice to the above, even if there is shortfall in making the power available up to the Contracted Capacity, the PPA provides for recovery of penalty for shortfall in Availability. Under Case1 PPAs, the obligation of the Seller is to make available the agreed capacity at the delivery point. In the present case, APML is capable of supplying and in fact has supplied 1320 MW to MSEDCL. In Case-1 PPAs, the Procurer is not required to examine the aspects relating to Auxiliary Consumption. Hence, there is no need to amend the Contracted Capacity of 1320 MW PPA.

8.4. The following background is relevant to the issues being raised by MSEDCL:

- a) MSEDCL initiated the bidding process under Case 1 Stage 1 in FY 2006-07. It used Case 2 SBDs since Case 1 SBDs were not available at the time. The Case 2 SBDs including the PPA were appropriately modified.
- b) MSEDCL took approval of the Commission for the modified SBDs on 24.01.2008 and issued the approved Documents to the bidders.
- c) APML submitted its bid on 20.02.2008 and, on being declared a successful bidder, executed the PPA with MSEDCL on 08.09.2008. Admittedly, MSEDCL adopted and executed exactly the same PPA with APML as was approved by the Commission.
- d) The Commission has adopted the tariff under that PPA vide its Order dated 19.08.2013, and it has been followed by both the Parties in letter and spirit.

- e) The following PPA provisions relating to the “Contracted Capacity” and “Auxiliary Consumption” are important:

*““Availability Factor” or “Availability” shall have the meaning ascribed thereto in ABT (provided that in place of Installed capacity and Normative auxiliary consumption it shall be Contracted Capacity).”*

*...“Contracted Capacity” means (i) for the second unit 660MW and; (ii) for the third Unit 660MW rated net capacity at the interconnection point offered to and accepted by the procurer, and in relation to the power Station as a whole means 1320MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, or such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement (i.e. derating capacity), where the rated capacity offered to and accepted by the procurer could be the entire rated net capacity of the unit or a portion thereof...*

*...4.4.4 The Seller shall not itself use any of the electricity generated by the unit, to the extent of its contracted capacity during the term of this Agreement, except for the purpose of meeting the Unit's auxiliary load requirements, as per the norms laid down by the MERC, load requirements of the captive coal mine as per applicable Law [If applicable land housing colony for the staff.]”*

- 8.5. Based on the Auditor’s observation on the issue of Contracted Capacity, MSEDCL has filed the present Petition contending that the Contracted Capacity of 1320 MW is the gross capacity (i.e., Installed Capacity), and accordingly sought its reduction.
- 8.6. The above definition of the “Contracted Capacity” read with the definition of “Availability” makes it clear that the Contracted Capacity is net of Auxiliary load requirements, and even the declaration of Availability is to be computed on such Net Capacity at the interconnection point.
- 8.7. As observed above, the Contracted Capacity is on net basis for this PPA. It was with this understanding that subsequent PPAs with MSEDCL for 1200 MW, 400 MW and 125 MW, were executed on similar lines, i.e. net of Auxiliary Consumption, to ensure availability of enough capacity to fulfil the Auxiliary power requirement of the entire TPS. The following Table shows reconciliation of Installed Capacity, Auxiliary Consumption and Contracted Capacity on net basis under various PPAs with MSEDCL:

Particulars	Capacity (MW)
Contracted Capacity under PPA dated 09.08.2008	1320
Contracted Capacity under PPA dated 31.03.2010	1200

<b>Particulars</b>	<b>Capacity (MW)</b>
Contracted Capacity under PPA dated 09.08.2010	125
Contracted Capacity under PPA dated 16.02.2013	440
<b>Total Contracted Capacity with MSEDCL</b>	<b>3085</b>
Installed Capacity of Tiroda TPS (5 x 660 MW)	3300
Auxiliary Consumption @ 6.5% of Installed Capacity	215
<b>Ex-bus Net Capacity of the Tiroda Power Station</b>	<b>3085</b>

- 8.8. It is evident from the above that MSEDCL has contracted only Net Capacity. Further, all the five Units of Tiroda TPS are connected to the same Bus, and Auxiliary Consumption is only for accounting purpose. What is essential is to check whether APML is in a position to supply 1320 MW capacity at the Bus.
- 8.9. MSEDCL has cited Article 4.4.4 of the PPA to argue that the Seller is bound to use Auxiliary power from the same Unit. However, plain reading of that Article establishes that there is no compulsion, but the flexibility to use Auxiliary from the same Unit if so desired by the Seller. The PPA does not bind the Seller to use Auxiliary from the same Unit, and it is free to arrange Auxiliary power requirement from any other source. In the present scenario, APML has been complying with the Article 4.4 and there is no case for its modification or reduction of Contracted Capacity and retrospective tariff adjustment. In any case, the PPA provides for reduction in payment of Capacity Charges if there is a shortfall in achieving normative Availability.
- 8.10. Further, admittedly MSEDCL has entered into PPA with the Impleaded Parties in accordance with the SBDs under the Competitive Bidding Guidelines for long term issued by MoP, GoI under section 63 of the EA, 2003. Also, the PPA is nothing but a contract under Section 10 of the Contract Act, 1872. Accordingly, MSEDCL cannot unilaterally demand a change in the terms and conditions of the contract without the consent of APML. If the other Party is not willing for any amendment to the PPA, it cannot be done so. Also, MSEDCL has failed to state any change in law, Act, rules and regulations which require any amendment to the PPA.
- 8.11. Also, it is an admitted fact that MSEDCL entered into the PPA after duly understanding the terms and conditions of the competitive bids laid down by the Central Government in its Guidelines under Section 63. MSEDCL has enjoyed the terms and conditions of the PPA for 8 years. Furthermore, MSEDCL agreed upon the Contracted Capacity by its own decision. Thus, in the light of the act of MSEDCL of accepting the terms and conditions of the PPA and thereafter acting on them, it is estopped from challenging the same and seeking its amendment without any change in law, rules, regulations or Act.

- 8.12. MSEDCL has stated that, as per the Auditor, because the Gross Capacity of two Units has been considered as the Contracted Capacity, it is bound to pay Capacity Charges until the supply of 1056 MW (Normative supply – 1320 x 80%) Contracted Capacity and the incentive thereafter. Whereas, if the Contracted Capacity is actually reduced to the extent of Auxiliary Consumption, it would have to pay Capacity Charges only for the supply of 987 MW (net of Auxiliary Consumption of 6.5% (say)) and incentive thereafter at a discounted rate of only Rs. 0.25/kWh -meaning thereby, it has been contended that MSEDCL is paying higher charges for supply between 1056 MW and 987 MW, i.e., 69 MW.
- 8.13. In this regard, payment of such charges cannot be termed a loss to MSEDCL in any case, as it is in line with the terms of the PPA as also approved by the Commission. As such, the Auxiliary Consumption for that supply has been provided from other Units of APML's Tiroda TPS. Secondly, without prejudice, the claim of purported loss to MSEDCL is misleading, as shown in the Table below:

Description	UoM	Formula	100% PLF	80% PLF
Contracted Capacity-PPA	MW	A	1320	1056
Cont. Capacity - MSEDCL	MW	$B = A * (1 - 6.5\%)$	1234	987
Difference	MW	$C = A - B$	86	69
PPA fixed charge Rate	Rs./kWh	D	1.113	1.113
Alternate Source Rate <sup>s</sup>	Rs./kWh	E	2.74	2.74
Difference	Rs./kWh	$F = E - D$	1.63	1.63
Energy/year	MU	$G = C * 365 * 24 / 1000$	752	601
<b>Impact to MSEDCL/year</b>	<b>Rs. Crore</b>	<b><math>H = G * f / 10</math></b>	<b>122</b>	<b>98</b>
<b>Impact for 22 years (approx.)</b>	<b>Rs. Crore</b>	<b><math>I = H * 22</math></b>	<b>2690</b>	<b>2152</b>

(\$ 2.74 Rs. / kWh is the L1 quoted fixed charge in recent Kerala bid)

- 8.14. As can be observed from the above Table, if the Contracted Capacity is reduced, as sought by MSEDCL, it will have to arrange a minimum quantum of 69 MW for meeting the shortfall by means of another PPA. Assuming the Fixed Charge payable under the new PPA for 69 MW @ Rs. 2.74 / kWh, i.e., the Fixed Charge quoted by the L1 bidder in the recent Kerala bid, MSEDCL will have to spend a minimum additional amount of Rs. 2152 crore considering Plant Load Factor (PLF) of 80% for procuring the same quantum over the next 22 years, which would be a huge loss to MSEDCL and to the consumers at large.

- 8.15. Further, MSEDCL has submitted that it has been paying Capacity Charges as per the PPA, and it could be higher due to Auxiliary Consumption as stated by the CAG. This

in itself is an admission by MSEDCL that the Contracted Capacity of 1320 MW is ex-Bus, and that this Petition is only a consequence of Auditor's wrong observations.

- 8.16. In view of the above, there is no requirement of amending the PPA as sought by MSEDCL. The definition of Contracted Capacity as mentioned above specifies Net Capacity of 1320 MW from Units 2 and 3 but does not restrict usage of power required for Auxiliary Consumption of Units 2 and 3 from other Units of the Tiroda TPS, i.e., Units 1, 2 and 3. The Contracted Capacity is defined in the PPA as Net Capacity of 1320 MW at ex-Bus. Further, the definition does not restrict the usage of Auxiliary power from other Units. In fact, it clearly specifies that 660 MW Net Capacity is offered at the interconnection point, and that is accepted by the Procurer.
- 8.17. MSEDCL has stated that ambiguity has been created because Article 4.4 of the PPA allows the Seller to use Auxiliary Power from the Contracted Capacity itself. However, Article 4.4 clearly establishes that there is no compulsion on the Seller to use Auxiliary Power from the same Unit and gives it flexibility to use power for Auxiliary Consumption from the same Unit, if so desired. The Seller is free to arrange Auxiliary Power requirement from other Units of the same TPS.
- 8.18. Therefore, there is no contradiction between Article 4.4.4 and the definition of Contracted Capacity under the PPA. Further, APML has been complying with the provisions of the above Articles of the PPA, and there is no case for modification of Article 4.4.4 or reduction of Contracted Capacity and retrospective tariff adjustments.
- 8.19. MSEDCL has extracted observations of the Government Auditors that, since the quantum of power generated but consumed within the Unit was not available for sale, declaration of Contracted Capacity by considering the gross capacity was not appropriate. It is further stated that the net available capacity at the delivery point after considering 9% Auxiliary Consumption would be 600.6 MW from each Unit, and that declaration of Contracted Capacity on gross basis has resulted in excess payment of Capacity Charges. In this regard, the observation of the Government Auditors is misplaced and not the correct interpretation of the PPA provisions. The above submissions clearly establish the position that Contracted Capacity of 1320 MW is at ex-Bus and usage of power for Auxiliary requirement is not mandatory from the same Units under the PPA.
- 8.20. Had this been the understanding of MSEDCL, it would not have scheduled 1320 MW power at ex-Bus, i.e. Delivery Point under the PPA. In fact, there are several occasions when MSEDCL has scheduled 1320 MW at ex-Bus. APML has also supplied the quantum with a correct understanding of the PPA.
- 8.21. There is no question of amendment of contractual provisions if the provisions are to mean Contracted Capacity of 1320 MW gross. From the conduct of MSEDCL, it is beyond doubt that it has always considered PPA capacity of 1320 MW net at ex-Bus.

- 8.22. MSEDCL has responded stating that the bid process was conducted as per modified Case 2 Documents after necessary approvals and that penalty has been recovered, if any, considering 1320 MW and 300 MW as Contracted Capacity at ex-Bus for APML and JSWEL, respectively:

*“In this context it is to state that, as per PPA, in case availability for a contract year is less than 75%, the seller is liable to pay penalty. Thus the seller is liable to pay penalty at the earlier stage i.e. for the quantum supplied less than 225 MW in case of JSW and 990 MW in case of APML. Accordingly, MSEDCL has deducted penalty from JSW for the period 2010-11 and 2011-12.”*

- 8.23. The above response itself captures the understanding of MSEDCL that Contracted Capacity of 1320 MW is net ex-Bus and that the present Petition is an afterthought and liable to be rejected. The conduct of parties under the PPA has to be in line with the provisions of the PPA and not based on the understanding of a third party.
- 8.24. MSEDCL’s response to the Government Auditor that it will approach the Commission cannot be the basis for amendment of the PPA by way of this premature Petition. If at all there is any doubt in the mind of MSEDCL, it has to first exhaust the recourse under the PPA before approaching the Commission. The contention in the present Petition has never been raised before APML and cannot be termed as a dispute under the PPA before any mutual discussion in terms of the PPA. On this ground alone, the Petition does not stand on sound legal footing.
- 8.25. MSEDCL has stated that it is paying higher fixed charge for 69 MW (80% of 1320 MW – 80% of 1234 MW), in view of consideration of 1320 MW as Net Capacity. The observation of MSEDCL is not correct. If the Contracted Capacity is reduced, MSEDCL would have to arrange the same quantum at a much higher price from a new source, which will in effect result in net loss to MSEDCL.
- 8.26. In the recently concluded bidding for long term purchase of power by Kerala, Capacity Charge quoted by L1 bidder was Rs. 2.74/kWh (as against Rs. 1.11 per kWh under APML’s 1320 MW PPA for FY 2014-15). If MSEDCL is required to procure the shortfall quantum of 69 MW due to reduction in Contracted Capacity, it would have to incur approx. Rs. 165 crore as against Rs. 52 crore under the APML PPA. It is clear that MSEDCL will be benefiting from retaining such Contracted Capacity under the PPA instead of reduction. Therefore, there is no gain to MSEDCL by reducing the Contracted Capacity. In fact, MSEDCL will lose its right over cheaper power available under the 1320 MW PPA.
- 8.27. MSEDCL has stated that it is paying Capacity Charges as per the PPA. However, it could be higher due to Auxiliary Consumption as stated by the CAG. This is an admission by MSEDCL that the Contracted Capacity of 1320 MW is ex-Bus and

filing of the present Petition is only a consequence of the Auditor's wrong observations.

- 8.28. APML had offered 1420 MW from out of 1980 MW of Units 1, 2 and 3. As such, it is clear that there was enough cushion in Unit 1 to fulfil Auxiliary power requirement of all the three Units.
- 8.29. That the Net Capacity means the Unit-wise rated Net Capacity at the interconnection point offered to and accepted by the Procurer is incorrect and misleading. 'Net Capacity' has not been defined under the PPA and APML cannot give such meaning at its own discretion. The definition of Contracted Capacity clearly states

*“and in relation to the Power Station as a whole means 1320 MW rated net capacity at the Interconnection Point offered to and accepted by the procurer.”*

Parties to the PPA cannot add words to the terms defined under the PPA in order to fulfil a desired objective. If it would have been Unit-wise Net Rated Capacity, there was no need of clearly mentioning in the same definition *“in relation to the Power Station as a whole.”* Thereby, it is clear that the intention behind including the word 'Power Station' is that the Auxiliary Energy Consumption to be used is from Units other than Units 2 and 3.

- 8.30. PPAs under Case1 Stage 1 are executed for Rated (Gross) Capacity and the PPAs under Case1 Stage 2 are executed for Net Capacity (after deducting Auxiliary Consumption). The contention that it has resulted in ambiguity within the PPA provisions is devoid of facts and denied in view of the justifications provided. The Contracted Capacity of 1320 MW is on net basis only and there is no case for reduction in Contracted Capacity or amendment of the PPA dated 08.09.2008. Therefore, the Petition needs to be rejected.

9. Vide its additional submission received on 28.12.2016, JSWEL has stated that:

- 9.1. At the last hearing, the Commission had asked JSWEL to indicate how it would be able to meet its obligation to supply the Contracted Capacity as per the PPA to MSEDCL if Units 2, 3 and 4 of its TPS are fully tied up under contracts with other purchasers.

- 9.2. As per the PPA, the term “Contracted Capacity” means:

*“for the first Unit, 300 MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, and in relation to the Power Station as a whole means 300 MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, or such rated capacities as may be*

*determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement, where the rated capacity offered to and accepted by the Procurer could be the entire rated net capacity of the unit or a portion thereof.”*

9.3. As per Article 4.3, JSWEL is obligated to sell to MSEDCL all of the Available Capacity upto the Contracted Capacity of the TPS, pursuant to despatch instructions given by MSEDCL.

9.4. As regards the specific query of the Commission, it being a hypothetical event or a contingency, the provisions of Article 19 (Supply from Alternate Sources) of the PPA may be noted, which provides that, in the event JSWEL is not able to supply 100% of the Contracted Capacity (in the manner contemplated above), JSWEL shall make arrangements and supply from alternate sources of fuel and from sources other than the Unit identified by JSWEL during the bid process. Therefore, assuming that JSWEL is unable to schedule power based on Normative Availability for a Contracted Capacity of upto 300 MW, JSWEL has the right to meet its supply obligation under the PPA from alternative sources. Article 19 reads as follows:

*“ARTICLE 19: SUPPLY FROM ALTERNATIVE SOURCES*

*Supply from alternate sources of fuel and from sources other than the unit identified by the Seller in the RFP for competitive bidding process initiated by the Procurer through issue of RFQ and RFP for process for procurement of generation capacity and purchase and supply of electricity is allowed.....”*

9.5. Article 4.1.1(b) of the PPA provides that JSWEL is required to make available as much of the Contracted Capacity as can be made available through prudent utility practices to meet MSEDCL’s scheduling and dispatch requirements. Article 8.1 states that, in case the Available Capacity has not been 100% of the Contracted Capacity of the Unit, MSEDCL may require JSWEL to carry out a repeat performance test in order to demonstrate the Capacity of the Unit.

9.6. The term “Normative Availability”, as defined in the PPA, means 80% Availability at the Delivery Point on a Contract Year basis. Therefore, Normative Availability for the purpose of the PPA would be the Availability corresponding to 80% of 300 MW. Therefore, in order for Normative Availability to be achieved, JSWEL is required to ensure that the Declared Capacity, on an average in a Contract Year, is not less than 80% of the Contracted Capacity.

9.7. As per Schedule 6 (Tariff) of the PPA,

*“...full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond 80% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be*

*payable on proportionate basis in addition to the penalty to be paid by Seller as provided in this Schedule.”*

9.8. Therefore, the Capacity Charges are payable when the Availability of the Power Station is equal to “Normative Availability”. Incentives are payable for Availability higher than Normative Availability, and penalties apply only where the Availability of the Plant is below the Normative Availability and further falls below 75%.

9.9. The Commission had also asked regarding the provision in the PPA as to the manner of effecting amendments to the PPA. Article 18.1 which provides as under:

*“This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the MERC, where necessary.”*

Therefore, any amendment to the PPA requires written agreement of MSEDCL and JSWEL.

10. In its additional submission dated 14.3.2016, APML has stated as follows:

10.1. At Para 4(e) of its Reply dated 22.12.2016, APML had stated that:

*“In fact APML has supplied and MSEDCL has availed 1320 MW many times and hence there is no requirement for reduction in contracted capacity. MSEDCL has paid capacity charges corresponding to 1320 MW. Incentive and/or Penalty computations were made considering 1320 MW as Contracted Capacity.”*

10.2. In support of the above submission, APML is now submitting month-wise details of time blocks during which it had offered the entire 1320 MW capacity and the time blocks during which MSEDCL has scheduled the entire 1320 MW, as follows:

<b>Month</b>	<b>No. of time blocks in which APML offered 1320 MW</b>	<b>% w.r.t. total time blocks in the month</b>	<b>No. of time blocks in which MSEDCL scheduled 1320 MW</b>	<b>% w.r.t. total time blocks in the month</b>
Oct-14	142	5%	113	4%
Nov-14	2381	83%	1809	63%
Dec-14	1915	64%	1120	38%
Jan-15	96	3%	50	2%
Feb-15	13	0.4%	13	0.4%
Mar-15	569	19%	123	4%
May-15	246	8%	192	6%
Jun-15	2105	73%	1161	40%
Jul-15	123	4%	113	4%

Month	No. of time	% w.r.t. total	No. of time blocks	% w.r.t.
Sep-15	290	10%	192	7%
Feb-16	2495	90%	1103	40%
Mar-16	1697	57%	792	27%

- 10.3. It is evident from the above that APML had offered 1320 MW in as many as 90% of time blocks and MSEDCL had availed it based on its requirement.
- 10.4. In view of the above, there is no case for reduction in the Contracted Capacity or amendment of the PPA.

### Commission's Analysis and Rulings

11. The Commission's observations and findings on the issues raised and the prayers of MSEDCL in its Petition are set out below.
- 11.1. MSEDCL's PPA with APML dated 8.9.2008 for 1320 MW defines the term 'Contracted Capacity' as follows:

*“Contracted Capacity” means (i) for the second Unit 660MW and; (ii) for the third Unit 660MW, rated net capacity at the interconnection point offered to and accepted the procurer, and in relation to the power Station as a whole means 1320 MW rated net capacity at the Interconnection Point offered to and accepted by the procurer, or such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement (i.e. derating capacity), where the rated capacity offered to and accepted by the procurer could be the entire rated net capacity of the Unit or a portion thereof;...*

The definition of Contracted Capacity in MSEDCL's PPA with JSWEL dated 23.2.2010 for 300 MW is identical to that of the APML PPA, except for reference to the Rated Net Capacity of 300 MW for one contracted Unit. Articles 6.3.4 and 8.2 referred to in the definition are also identical. Those Articles deal with the process and consequences of de-rating following Performance Tests, and we are not concerned with them here.

- 11.2. Article 4.4 of both PPAs deals with the treatment of the Units' Auxiliary Consumption from out of the Contracted Capacity:

*“4.4 The Seller shall not itself use any of the electricity generated by the unit, to the extent of its contracted capacity during the term of this Agreement, except for the purpose of meeting the Unit's auxiliary load requirements, as per the norms laid down by the MERC, load requirements of the captive coal mine as per applicable Law (if applicable) and housing colony for the staff.”*

- 11.3 The PPAs provide for payment of incentive by MSEDCL to APML and JSWEL for Availability higher than 80% over a Contract Year:**

*“Schedule 6: Tariff*

*...1.2.4 Contract Year Energy Incentive Payment*

*If and to the extent the Availability in a Contract Year exceeds eighty percent (80%), an incentive at the rate of 40% of the Quoted Non Escalable Capacity Charges (in Rs. /kWh) for such contracted Year mentioned in Schedule 10 subject to a maximum of 25 paise/kwh, shall be allowed on the energy (in kwh) corresponding to the availability in excess of eighty percent (80%).”*

The PPAs have a corresponding provision for penal payments by the Generators to MSEDCL if the Availability of their contracted Units falls short of the normative level of 80% over the Contract Year.

- 11.4 MSEDCL initiated the Case 1 power procurement process leading to these PPAs with APML and JSWEL in FY 2006-07. At that time, only the SBDs for Case 2, applicable for power procurement from Generation Projects at pre-identified locations, had been notified by the GoI in terms of its Competitive Bidding Guidelines under Section 63 of the EA, 2003. Since the SBDs for Case 1 Projects were not available at that time, the Case 2 SBDs, including the PPA, were applied by MSEDCL with certain deviations. GoI’s Competitive Bidding Guidelines require that deviations be approved by the Appropriate Commission. Vide its Order dated 24.1.2008 in Case No. 38 of 2007, the Commission approved the revised Bidding Documents proposed by MSEDCL for the Case 1 bidding process initiated by it, with some changes. The revised Bidding Documents were approved by the Commission after public and stake-holder consultation. At that time also, the Case 1 SBDs were not available, having been published by GOI only in 2009.**
- 11.5 MSEDCL accordingly invited bids based on these revised Bidding Documents, and the Generators had bid based on the provisions of the PPA format approved by the Commission for the Case 1 Stage 1 competitive bidding process. As the outcome of that process, the Commission also subsequently approved the PPAs entered into and adopted the tariffs under Section 63 on the basis of the bids received.**
- 11.6 In Case No. 38 of 2007, MSEDCL had not sought (except for the level of normative Availability, which was rejected by the Commission), nor did the Commission approve, any deviation from the definition of Contracted Capacity and the treatment of Auxiliary Consumption in the Case 2 SBDs notified by the**

Central Government. The incentive and penalty provisions are also the same. As is evident from a plain reading of the relevant PPA provisions quoted above, there is also no ‘ambiguity’ in the relevant PPA provisions nor any contradiction between one provision and another as claimed by MSEDCL.

11.7 MSEDCL has approached the Commission now, several years after the revised Bidding Documents were approved and the competitive bidding process and the PPAs were concluded, citing subsequent CAG audit observations. On that basis, MSEDCL has proposed that the PPA provisions, considering which APML and JSWEL had made their bids, be revised retrospectively to exclude Auxiliary Consumption from the Contracted Capacity, as in the Case 1 SBD PPAs notified by GoI (and considering which Stage 2 PPAs were entered into by MSEDCL) after the revised Stage 1 Bidding Documents were approved by the Commission. According to MSEDCL, the consequential reduction in Contracted Capacity (from 1320 MW to 1234 MW, and from 300 MW to 273 MW in the case of APML and JSWEL, respectively) would benefit MSEDCL in terms of the incentive and penalty and the Capacity Charges payable under the PPAs.

11.8 Amendments to the PPAs, as sought by MSEDCL, are governed by Article 18.1, which is along the lines of the SBD PPAs notified by the Central Government for both Case 1 and Case 2 Projects:

*“This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the MERC, where necessary.”*

Neither APML nor JSWEL have agreed to the revisions proposed by MSEDCL.

11.9 In the above background and facts, the Commission cannot agree to MSEDCL’s proposal to modify the relevant provisions of the PPAs which have been duly entered into under Section 63 of the EA, 2003, much less retrospectively. The proposed revisions affect fundamental parameters of the PPAs, and are not mere corrections. They would amount to re-opening the PPAs. The Commission is in any case not empowered to do so in terms of Section 63 of the EA, 2003 unless these revisions are also agreed to by the other parties to the contracts. This is the settled position in law. In this context, JSWEL has cited the APTEL Judgment dated 2.6.2006 in Appeal Nos. 1 and others of 2005 (under Section 62), but there are several other Judgments of the APTEL, and of the Supreme Court with regard to power sector PPAs and other contracts, which re-iterate this position.

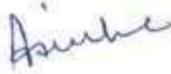
12. The Commission notes that MSEDCL is silent on whether the proposed amendments would amount to a Change in Law under the PPAs and thereby negate any financial benefit to it.

13. **APML has submitted the month-wise (October, 2014, to March, 2016) details of time blocks in which it offered the entire 1320 MW capacity and the time blocks in which MSEDCL scheduled that entire quantum. APML had offered 1320 MW in many time blocks and MSEDCL had availed it considering its requirement. Thus, it seems that APML met its Auxiliary requirements from some other Unit(s) on those occasions. The Commission notes that it is not mandatory to meet the Auxiliary power requirements of a contracted Unit from that Unit alone if and when APML and JSWEL have other untied or unutilised capacity to meet it. In any case, if the Generators do not meet the normative Availability, they are liable to payment of penalty.**

The Petition of Maharashtra State Electricity Distribution Co. Ltd. in Case No.122 of 2015 stands disposed of accordingly.

**Sd/-  
(Deepak Lad)  
Member**

**Sd/-  
(Azeez M. Khan)  
Member**

  
**(Ashwani Kumar Sinha)  
Secretary**

