

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 102 of 2018**

**In the matter of**

**Petition of Avinash Constructions under Section 86(1) (f) for adjudication of dispute on the issue of outstanding payments of Power Purchases, interest on delayed payment and surcharge for Wind Power supplied by it to MSEDCL.**

**Coram**

**Shri. Anand B. Kulkarni, Chairperson**  
**Shri. Mukesh Khullar, Member**

Avinash Constructions ..... Petitioner  
V/s  
Maharashtra State Electricity Distribution Company Limited (MSEDCL) ... Respondent

**Appearance**

For the Petitioner : Shri. Sourav Roy (Adv.)  
For MSEDCL : Shri. Satish Chavan (Res)  
For Authorized Consumer Representative : Dr. Ashok Pendse, TBIA

**ORDER**

**Date: 15 June, 2018**

1. Avinash Constructions is a Partnership company having its registered office at ABIIIL House 2, Ganeshkhind Road, Range Hills Corner, Pune -411007 defined as generating company under Section 2(28) of the Electricity Act, 2003, having established and operating one wind generating unit of capacity of 0.80 MW (1x 0.8 MW) at Village Yelsewadi Bamberwadi, Taluka Shirala, Sangli, Maharashtra and are connected to feeders at Bambarwadi II 33 – 110 KV substation.
2. Avinash Constructions has filed Petition under Section 86(1) (f) for adjudication of dispute on the issue of outstanding payments of Power purchases, interest on delayed

payment and overdue interest for delay payment surcharge for Wind Power supplied by it to MSEDCL.

3. The main prayers of Avinash Constructions are as under-

- (a) *Direct the Respondent to pay the principal and delayed payment surcharge payable to the Petitioner in terms of the PPA and remit an amount of Rs. 4,116,751 towards bills raised and submitted for generation up to November 2017 and Rs. 715,780 towards the delayed payment surcharge for the payments received up to February 2017 billings from SE Sangli as per the Statements attached in Annexure” C “ to the Petition;*
- (b) *Direct the Respondents to pay carrying cost at the rate of 15% per annum of the delay in payment of the late payment surcharge by the Respondent;*
- (c) *Direct the Respondents to remit the amounts due and payable on time in terms of the PPA;*
- (d) *Direct the Respondent to pay the costs of the present petition; and*
- (e) *Pass such other further order(s) as the Hon'ble Commission may deem just in the facts of the present case.*
- (f) *Permit additions and deletions of facts during process of the hearing*

4. Avinash Constructions in its Petition has stated as follows:

(a) Avinash Constructions is supplying electricity generated by its Wind generator to MSEDCL. For the said purpose, it has entered into a Eower Purchase Agreement (EPA) with MSEDCL on 2 April, 2007 providing for the terms and conditions for supply of electricity. The tariff for such supply is as determined by the Commission.

(b) The EPAs, inter-alia, provided for the terms under Article 12 on which the invoices are to be raised, the tariff applicable, the period within which the invoices are to be cleared and the consequences of delay in payment by MSEDCL. The EPA, inter-alia, provides as under with regard to the payments of invoices raised and late payment surcharge:

*ARTICLE – 12:- BILLING AND ENERGY ACCOUNTING*

*Section 12.01 Monthly Energy Bills:*

*The Seller shall raise a monthly energy bill based on the Joint meter readings no later than 15 days after the end of each calendar month. The Seller will send to MSEDCL by hand delivery / courier, the monthly energy bill showing all billing parameters, rates and factors, and any other data reasonable pertinent to the calculation of monthly payments to the Seller in the format set out in Exhibit “G”*

*Section 12.02 Payments*

*The due date of payment shall be 45 days from 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 authorized 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 charge interest on such delayed payment at the rate of 2% per annum above the State Bank of India short term lending rates. The MSEDCL, however, shall be entitled to make adjustments 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 the MSEDCL*

*Section 12.03 Billing and Payment Records:*

*The Billing and Payment records shall be maintained by the Seller for the reconciliation by the Corporate Office of MSEDCL bi annually.*

(c) In terms of the above, the payments were required to be made by the MSEDCL within 45 days from receipt of the Avinash Constructions monthly energy bills failing which it shall be entitled to charge late payment surcharge at the rate of 2% per annum above the State Bank of India's short-term lending rates.

(d) The electricity was supplied by Avinash Constructions to MSEDCL in terms of the Agreements and bills were raised for the electricity supplied at the tariff rate as provided for in the Agreement. However, there have been substantial delays in the payments to be made by MSEDCL on the invoices raised by it. The delays are varying from 10 and to 300 days and beyond the due date for payments. Thus, MSEDCL was liable to pay overdue interest at the rate of 2% per annum above the State Bank of India's short-term lending rates for the delay in the payment, as per the terms of the Agreement between the parties.

(e) Principal amount pending with MSEDCL is Rs. 4,116,751(bills raised and submitted for generation up to November 2017) and Rs. 715,780 towards the delayed payment surcharge for the payments received up to March 2017 billings (except the payment for the month of February 2017 amounting to Rs. 233,174). The last payment received by it is in January 2018 for the billing month of March 2017. Since it has not received payments for the bills raised post March 2017 and February 2017, the late payment interest and interest on delayed payment of overdue interest have not been calculated on those bills. In addition, on many occasions there are delays in the issue of JMRs and added /contributed to the delayed raising of the invoices by MSEDCL. Avinash Constructions has been continuously following up with MSEDCL every month personally and via written communication dated 13 May, 2016 and dated 24 February, 2018. However there has been no response on behalf of MSEDCL.

(f) It owns and operates wind generating units, which are Renewable Energy (RE) and are to be promoted and incentivized under the provisions of the Electricity Act, 2003, the Regulations framed there under and as per the orders passed by the

Commission from time to time. One of the primary requirements of RE projects to operate in a sustained and viable manner is payment discipline to be maintained by the utilities and not to delay the payments to be made. The delays while increasing the burden on the interest burden on the utility results in substantial cash flow problems to it.

(g) Provisions in EPA provides for the due date to be 45 days upon the receipt of the invoices, which is very liberal compared to other States where it is in the region of 30 days or less. Despite such liberal provisions, the MSEDCL invariably making delay in the payment of invoices, resulting in substantial loss and prejudice to it. Further, the MSEDCL is also not paying the interest amounts due and payable in terms of the EPA.

(h) MSEDCL is further liable to compensate it for the delay in payment of the late payment surcharge. MSEDCL being required to pay the delayed payment surcharge for payment of the principal amount, ought to pay the interest/carrying cost till the time the amounts due and payable are fully paid to it. The amounts due and payable to Avinash Constructions cannot be disputed and is clearly in terms of the agreement between the parties. MSEDCL has also not disputed the liability to pay the delayed payment surcharge to it, but have only failed to pay the same.

(i) APTEL in Appeal No. 1 of 2010 Dated 1 October, 2010 had upheld the Commission's order dated 12 September, 2006 in Case No. 10 of 2006 on interest payment beyond 45 days after the receipt of the invoices and even penalized MSEDCL by levying an exemplary cost.

The relevant portion of the APTEL order is reproduced as under:

*9. On 24.11.2003, the State Commission passed the detailed tariff order for Wind Power Generation. Through this order it was directed that the Developer shall raise monthly energy bill based on the joint meter reading (JMR) taken by the Developer and the State Electricity Board and the due date for payment shall be within 45 days from the date of the bill and in case of delay the Developer shall be entitled to interest on delayed payment at the rate of 2% above the SBI short-term lending rate.*

*10. On 03.05.2006, the Renewable Energy Developers Association, Respondent-2 herein, filed an application before the State Commission seeking for direction for the implementation of the order of the State Commission dated 24.11.2003. In this application, on 12.09.2006, the State Commission passed order directing the Appellant namely, the successor of the Electricity Board to pay interest on delayed payment within one month of the date of the order to Wind Developers having any type of valid NOC for the period since the date of commissioning of the project.*

*11. This order was challenged by the Appellant before the Tribunal in Appeal No. 15 of 2007. On 05.02.2008, the Tribunal dismissed the Appeal observing that the Appellant is liable to pay interest and there was no reason as to why*

*the Appellant should not pay interest from the date when the payment becomes due. Even then, these orders have not been complied with.*

*12. Hence, on 16.01.2009, the Renewable Energy Developers Association (R-2) filed Application before the State Commission seeking for implementation of the orders of the State Commission dated, 24.11.2003, 12.09.2006 and the order of the Tribunal dated 05.02.2008 contending and complaining that the Appellant had not made payments from the time the energy is fed into the grid and for this the distribution company, the Appellant has stopped accepting the invoices. In the reply to this Application, the Appellant contended that it had made payment only to the Wind Energy Developers who had raised invoices based on the joint meter reading; they have not received the bills from the Developers, therefore, the liability of the Appellant for making payment to other developers would not arise till they receive the bills or invoices from them.*

*13. The State Commission ultimately, by the impugned order dated 17.08.2009, has held that wherever invoices have not been issued after joint meter reading, 30 days from the joint meter reading would be deemed to be the date of the bill and the last due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days, interest would become due. By this order, the State Commission directed the Appellant to pay joint meter reading amount as well as penal interest to the developers even without issuance of the bill. Aggrieved by this order, the Appellant has filed this Appeal.....*

### 37. SUMMARY OF OUR FINDINGS

*(iv) It is specifically stated by the Respondent Association that .....*

*day from the Joint Meter Reading would be taken to be date of the bill and as such the due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days interest would become due. This conclusion, in our view, is correct. Under these circumstances, the State Commission in the impugned order dated 17.09.2009 has held in giving a practical solution*

*“wherever invoices have not been issued, the 30<sup>th</sup> day from the Joint Meter Reading would be taken to be date of the bill and as such the due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days interest would become due. This conclusion, in our view, is correct.*

### 38. CONCLUSIONS:

*In view of our findings, as referred to above, we conclude that the Appeal has no merit and the same is liable to be dismissed and accordingly dismissed.*

(j) Further, in the latest combined Order dated 17 January, 2018 the Commission in case No. 73, 74 and 78 of 2017 passed the following judgment reading:

*“14. All the EPAs have standard Clauses requiring MSEDCL to pay DPC for delay in paying the principal amounts (at 2% per annum above the SBI short-term lending rate beyond 60 days in some, and at 1.25% per month after 45*

days in others). These Clauses are based on the Commission's first Wind Energy Order dated 18 September, 2003 in Case Nos. 3, etc. of 2002 and subsequent Orders, the relevant Regulations, and other dispensations from time to time. While some specifics may differ, such provisions for delayed payments are not peculiar to Wind EPAs, and are also specified in the Commission's Multi-Year Tariff Regulations, RE Tariff Regulations and Open Access Regulations.

15. In general, DPC is in the nature of a surcharge for default in making timely payments. While delay in making payments impacts the concerned Generators, the DPC liability also affects MSEDCL since it cannot pass it on to its consumers because it arises out of a default in duly making payments. The financial difficulties cited by MSEDCL are extraneous to its contractual obligation to pay Generators in time, along with DPC to the extent of any delay.

16. This is the settled position in law, and the Petitioners have cited various rulings in this regard. In its Order dated 10 August, 2016 in Case No. 150 of 2015 in the Hindustan Zinc matter (which has been appealed against by MSEDCL but admittedly not stayed by the APTEL), in its Order dated 16 March, 2017 in Case No. 53 and other Cases of 2016 and also more recently in its Order dated 16 May, 2017 in Case Nos. 157 and 166 of 2016 and 18 of 2017, the Commission has held similarly about the payment of principal amounts and DPC. The principle of DPC has also been upheld by the APTEL in Appeal Nos. 15 of 2007, 148 of 2009, 1 of 2010 and 11 of 2012 – all concerning payments for the energy sold by Wind Energy Generators in Maharashtra to MSEDCL – which have been quoted by the Commission in its earlier Orders.

17. In view of the foregoing, the Commission expects MSEDCL to pay the outstanding principal amounts due to the Petitioners expeditiously. In the meantime, in line with its Order in Case No. 150 of 2015 and its more recent Orders dated 16 March and 16 May, 2017, the Commission directs MSEDCL to pay the outstanding DPC amounts within 30 days. Thereafter, interest will accrue at 1.25% per month on any DPC amount remaining to be paid.

18. SPAD and KEC have stated that, in some recent months, MSEDCL had not issued GCNs, without which they could not even raise invoices for the energy injected. In the recent proceedings of Case No. 60 of 2017, MSEDCL had explained that it was putting in place an automated ERP system which took time to become fully operational, but could not explain why it did not issue the GCNs manually in the meantime as in the past.

19. In the context of delays in the issue of GCNs as a result of which Wind Energy Generators could not raise bills, the Commission in its Order dated 17 August, 2009 in Case No 148 of 2008 had ruled as follows:

*“15...For cases, where bills have been raised after Joint Meter Reading (“JMR”), there cannot be any ambiguity. For delayed payments beyond 45 days from the date of the bill, MSEDCL is liable to pay interest. For cases, where JMR has been taken but no bill has been raised for whatever reasons, the submissions made by the Petitioner are that the payment becomes due to Wind Farm Developers from the time when the energy is fed into the grid, which is however not tenable as a bill or a claim has to be preferred for payment. It is alleged that MSEDCL stopped accepting invoices from the Wind Farm Developers, and/or MSEDCL insisted on quarterly invoices.*

*...the Commission... rules that as a practical and reasonable solution, wherever invoices have not been issued/ accepted, 30 days from JMR would be deemed to be the date of “bill” and last due date of payment by MSEDCL would be 45 days thereafter and for payments beyond 45 days, interest would become due.”*

(k) From these judgments it is apparent the overdue interest payment and the interest on the delayed payment surcharge by MSEDCL is payable and mandatory.

5. The proceedings of the hearing held on 9 June, 2018 are summarized as follows:

A. Advocate of Avinash Constructions stated that

- a) Avinash Constructions is a Wind Power generating Company having capacity of 0.8 MW located at Village Yelsewadi Bamberwadi, Taluka Shirala, Sangli, Maharashtra. It had entered into a EPA with MSEDCL on 2 April, 2007.
- b) As substantial amounts of energy bills (principal and interest on account of delayed payment) are due from MSEDCL, it has filed this Petition.
- c) According to the terms and conditions in EPA, energy bills shall be raised by the generator within 15 days after the end of each calendar month and it is to be paid within 45 days from receipt of the Seller’s monthly energy bills by the MSEDCL. MSEDCL should follow timeline as given in the EPA for making payments. But if it fails then late payment surcharge is payable.
- d) Avinash Constructions has categorized the payment issues in two parts as follows:
  - (i) Payment Received upto February, 2017:-
    - In this category it had received tariff component (bills for the electricity supplied at the tariff rate as provided for in the Agreement) but not within the stipulated time as per conditions in EPA. Therefore late payment surcharge was applicable on the

tariff component for this period and was claimed by Avinash Constructions to MSEDCL.

(ii) Payment after February, 2017 :-

- In this category it had not received tariff component (bills for the electricity supplied at the tariff rate as provided for in the Agreement) as per conditions in EPA. Therefore tariff component as well as late payment surcharge thereon was applicable and it was claimed by Avinash Constructions to MSEDCL.

e) Avinash Constructions has not received Principal amount of Rs 8,05,39,013/- , Delayed payment of Rs 1,76,15,435/- and Delayed payment surcharge of Rs 28,38,851/- upto May 2018.

B. MSEDCL stated that

- a) As it has not received the copy of the Original Petition, it cannot address the Prayers of Avinash Constructions.
- b) It has accepted that due to financial constraints, payments to the Wind Generators cannot be released in time. But it is making efforts to expedite the due payments.

C. Dr Ashok Pendse, TBIA has not submitted any comments/ suggestions in this regard.

6. MSEDCL in its reply dated 13 June, 2018 has stated as follows:

- a) MSEDCL has always obeyed and complied with the Orders of the Commission. The present reply is being filed without admitting any amount towards delayed interest on Delayed Payment Charges (DPC) as claimed by Avinash Constructions and more so in view of the explanation enumerated as under:
- b) The Petition filed by the Avinash Constructions is based on the claim of DPC which is being claimed based on the provisions of the EPA.
- c) MSEDCL has made payment of 16.27 lakhs in FY 2017-18 upto 31 March, 2018 and current outstanding principal amount Rs. 46.39 lakhs for period of April 2017 to February 2018 for generation and DPC of Rs. 7.08 lakhs..
- d) MSEDCL vide the present reply without going into the legality, genuineness, period of claim or calculations therein as claimed by Avinash Constructions, would like to address to the Commission certain issues faced by it which has led to the inadvertent delay in release of payments to Avinash Constructions.



e) Avinash Constructions has not received their payments on its due date due to various financial constraints faced by MSEDCL which is explained as under for the kind consideration of the Commission:

- (i) MSEDCL has been purchasing power from various sources and in every PPA the payment terms are mentioned. However, the entire cash flow of MSEDCL is dependent on the recovery of revenue and arrears from the consumers.

MSEDCL is supplying electricity to various categories of the consumers and 100% of recovery from all of them has been an uphill task meaning thereby that the revenue of MSEDCL is seriously affected. This in turn leads to a situation wherein MSEDCL is not able to make timely payment to not only wind generators but almost all generators.

As such MSEDCL has not been able to make timely payment to not only Avinash Constructions but to almost all categories of generators. MSEDCL has not deliberately or delayed the payment with any malafide.

- (ii) The terms of EPA are approved by the Commission and it is binding on MSEDCL to enter into future EPA's on these terms.

MSEDCL as an entity takes utmost care to adhere to such terms and conditions however inadvertent delay in payments to some generators are attributable to circumstances which are beyond the reasonable control of MSEDCL.

- (iii) Apart from above in the financial year 2016-17, the total revenue from all sources was Rs. 59849.58 Cr and shortfall at the end of the year was Rs. 3347.57Cr. Working capital requirement was limited to Rs. 7000 Cr in the form of short term loan from Banks during that time.

During the last five years, the total expenditure has increased; however total revenue has not increased in that proportion which resulted in to accumulate losses.

- (iv) There is substantial shortfall in collection as per Agreement Revenue Requirement (ARR) which has not been granted by the Commission as prayed by MSEDCL. The said shortfall gets covered in ARR or true up exercise by the Commission. The true up exercise is conducted after annual statutory audit of financial statements of MSEDCL. Considering the time required for annual statutory audit and regulatory process of the Commission, the true up exercise gets completed only after about 18 months from the approval of ARR. This results in inability in meeting the payment obligations.

Therefore revenue gap has increased over the years. It may not be out of place to mention that MSEDCL has to borrow loan from Financial Institutions like Banks, wherein interest is also a necessary component which in turn respondent does not get pass through in ARR.

Therefore liability increases resulting in non-payment to Generators as well as other sundry creditors. In the past MSEDCL generally used to borrow short term and long term loans from the Banks. However recently the Banks have refused to grant loan to MSEDCL as it's liability has substantially increased.

- (v) Due to above reasons no revenue stream is available to MSEDCL to meet timely payments of creditors including generators as whole.

MSEDCL is trying to get loan and has requested the Commission to cover the interest component in ARR. If such prayer of MSEDCL is allowed, it can request and borrow more loans from financial institutions so that payment of creditors including generators as whole can be made easily.

Due to reasons enumerated above, MSEDCL has not been able to make timely payments resulting into demand of DPC by the generators including Avinash Constructions. These conditions are beyond the reasonable control of MSEDCL.

- (vi) MSEDCL is managing the repayment of loan liability either by working capital or deferring some of the payments due, as no sufficient cash is available to clear all liabilities.

The Commission has not been approving the expenditure incurred on interest on working capital loan which ultimately has impacted in further reduction of internal cash available for payments for debt servicing.

- (vii) This deteriorating cash flow has resulted in following unforeseen situation:

- i. Total outstanding payment as on dated 31 May, 2018 is Rs. 12209.74 Crs.
- ii. The payment of other Renewable Energy (RE) generators is also pending.
- iii. Due to liquidity /Cash crunch the payments of Wind generators are lagging behind. Total outstanding of Wind generator is Rs.2502.52 Cr.

- f) MSEDCL is a State utility catering to consumers throughout the State and reliefs as prayed by Avinash Constructions if granted would seriously prejudice the

interest of consumers in the State as the same may be accounted as cost in the ARR of MSEDCL if allowed by the Commission.

g) MSEDCL has been making payments with a little delay to generators on account of the difficulties mentioned above; however such delayed payment is neither intentional nor deliberate. Claims like the present one made by Avinash Constructions would be an additional benefit to one private individual causing detriment to the overall interest of consumers.

h) The Commission being the guardian of the power scenario of the State has to take a reasoned decision for the benefit of all. It may not be out of place to mention that the Commission also has the inherent power to relax/modify certain provisions which may seem detrimental to the interest of the State.

i) MSEDCL craves leave of the Commission to file additional submissions/replies etc including but not limited to the question of law involved in the present matter as well as calculation of amount if directed by the Commission on a subsequent date.

j) The principal amount for the generation period April 2017 to November 2017 of Rs. 38.70 Lakhs is paid on 13 June, 2018.

### **Commission's Analysis and Rulings**

- 7. Avinash Constructions has filed the present Petition against MSEDCL for outstanding payments of Power Purchases, interest on the delayed payments and surcharge for the Wind Power supplied from it to MSEDCL.**
- 8. Some Wind Energy Generators in the past had approached the Commission for prolonged non-payment and/or late payment of principal amounts for the supply of energy as well as the Delayed Payment Charge (DPC) for such delayed payments by MSEDCL under the EPAs for their Wind Energy Projects. The Commission had issued a common Order on these Petitions in Case Nos. 53, 62, 68, 74, 75, 79, 135, 136 and 144 of 2016 and Miscellaneous Application No 22 of 2016 in Case No 53 of 2016 dated 16 March, 2017. In that Order, the Commission directed MSEDCL as follows:**

***“54. In view of the foregoing, the Commission expects MSEDCL to pay the principal amounts due to the Petitioners expeditiously. In the meantime, in line with its Order in Case No. 150 of 2015, the Commission directs MSEDCL to pay the DPC amounts due within 30 days. Thereafter, interest will accrue at 1.25% per month on any DPC amount remaining to be paid. In the case of those Petitioners who are also consumers of MSEDCL, these amounts could also be adjusted against their consumer energy bills.”***

9. Subsequently, more recently in its Combined Order dated 16 May, 2017 in Case Nos. 157 and 166 of 2016 and 18 of 2017, the Commission has held similarly about the payment of principal amounts and DPC.
10. Aggrieved by the Commission's Combined Order in Case Nos.53, 62, 68, 74, 75, 79, 135, 136 and 144 of 2016 and Miscellaneous Application No 22 of 2016 in Case No 53 of 2016 dated 16 March, 2017, MSEDCL has challenged the Commission's Order in APTEL. Recently APTEL in its various judgments dated 7 May, 2018 has disposed off the Cases regarding outstanding payment, delay payment surcharge of Wind Generators in terms of the judgment of APTEL dated 24 April, 2018 passed in Appeal No 75 of 2017. In this judgment of APTEL, the Order passed by the Commission in Case of 150 of 2015 of M/s Hindustan Zink Limited was upheld by APTEL. The Commission in Case of 150 of 2017 had ruled as follows:

*“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”.*

11. In view of the foregoing, the Commission directs MSEDCL to pay the principal amounts due to Avinash Constructions expeditiously. In the meantime, in line with its Combined Order dated 16 March, 2017 and more recent Combined Order dated 16 May, 2017, the Commission directs MSEDCL to pay the DPC due to WMFD as per Section 12.02 of Power Purchase Agreement within 30 days. Thereafter, interest will be payable at 1.25% per month on any delayed payment surcharge amount remaining to be paid.

The Petition of Avinash Constructions in Case No.102 of 2018 stands disposed of accordingly.

Sd/-  
(Mukesh Khullar)  
Member

Sd/-  
(Anand B. Kulkarni)  
Chairperson

  
(Dr. Rajendra Ambekar)  
I/c Secretary

