

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE No. 24 of 2017**

In the matter of  
**Petition of Maharashtra State Electricity Distribution Co. Ltd. regarding Change in  
Law events relating to Late Payment Surcharge provisions of PPAs under S. 63  
of Electricity Act, 2003**

**Coram**

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

Maharashtra State Electricity Distribution Co. Ltd. ....Petitioner

Vs.

Adani Power Maharashtra Ltd. ....Respondent No. 1  
JSW Energy Ltd. ....Respondent No. 2  
RattanIndia Power Ltd. ....Respondent No. 3  
GMR Warora Energy Ltd. ....Respondent No. 4

**Appearance**

For Petitioner:	Adv. Kiran Gandhi
For Respondent 1:	Shri. M.R.Krishna Rao
For Respondent 2:	Adv. Aman Anand
For Respondent 3:	Adv. Vishrov Mukerjee
For Respondent 4:	Shri. Alok Shankar

**ORDER**

**Date: 16 November, 2017**

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) has filed a Petition on 2 February, 2017 seeking relief for the Change in Law event arising from the introduction, by the Reserve Bank of India (RBI), of the Base Rate system and thereafter the Marginal Cost of

Funds-based Lending Rate system in place of the Benchmark Prime Lending Rate in terms of the relevant provisions of its Power Purchase Agreements (PPAs) with various Independent Power Producer (IPP) Generating Companies under Section 63 of the Electricity Act (EA), 2003.

2. The prayers of MSEDCL in the Petition are as under:-

a) *“To admit the Petition;*

b) *To declare and accept the Guidelines/Circulars issued by RBI as Change in Law as provided in respective PPAs.*

c) *To allow the Petitioner to make the late payment surcharge in the event of delay in payment at the rate of two (2) percent excess of the applicable Base Rate per annum on the amount of outstanding payment calculated on a day to day basis for each day of the delay against the PPAs mentioned in aforesaid para 2.2 and 2.3 from 1 July 2010 till March 31, 2016 and thereafter at the rate of two(2) percent in excess of the applicable rate under MCLR system...”*

3. The Petition states as follows:

3.1. As per the Competitive Bidding Guidelines issued by the Ministry of Power (MoP), Government of India for Case 1 bidding, MSEDCL had initiated two bidding processes for Case 1 Stage 1 and Case1 Stage 2 separately. The Commission’s approvals were obtained for the Bidding Documents. The bidding processes and the evaluation of bids were carried out as per these provisions and the PPAs signed accordingly.

3.2. MSEDCL has signed PPAs with the successful bidders under the Case1 Stage 1 bidding process as follows:

i.) PPA dated 14/08/2008 with Adani Power Maharashtra Ltd.(APML) for 1320 MW at the levelised tariff of Rs. 2.64 per unit from Units 2 and 3 of its Tiroda Project.

ii.) PPA dated 25/09/2008 with Lanco Vidarbha Thermal Power Ltd. (formerly Lanco Mahanadi Power Pvt. Ltd.) (‘Lanco’) for 680 MW at the levelised tariff of Rs. 2.72 per unit from its Wardha Project.

iii.) PPA dated 23/02/2010 with JSW Energy (Ratnagiri) Ltd. (‘JSW’) for 300 MW at the levelised tariff of Rs. 2.71 per unit from Unit 1 of its Ratnagiri Project.

3.3. MSEDCL submitted Petitions for approval of these PPAs under Section 63 of the EA, 2003. Vide its Order dated 27 November, 2009 in Case No.39 of 2009, the Commission approved the PPA with JSW for 300 MW. Vide Order dated 20 February, 2013 in Case

No. 68 of 2012, it approved the PPA with APML for 1320 MW and with Lanco for 680 MW, and adopted the tariff.

3.4. APML and JSW have commenced supply. However, the Project of Lanco has not been commissioned so far. Lanco has filed a Petition for termination of its PPA. MSEDCL has also filed a Petition for recovery of liquidated damages from Lanco for non-commencement of supply.

3.5. The relevant Clauses of these PPAs read as follows:

*“Article 1:Definitions and Interpretation*

*Change in Law - shall have the meaning ascribed thereto in Article 13.1.1 of this agreement*

*...Indian Governmental instrumentality – means the GoI, Government of Maharashtra and any ministry or, department of or, board, agency or other regulatory or quasi-judicial authority controlled by GoI or Government of States where the procurer and project are located and includes the CERC and MERC*

*...Late Payment Surcharge – shall have the meaning ascribed there to in Article 11.3.4*

*Law - means, In relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the CERC and the MERC*

*...SBAR- means the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.*

*Article 11: Billing and Payment*

*...11.3.4 In the event of delay in payment of a monthly bill by the procurer beyond its due date month billing, a Late Payment Surcharge shall be payable by the procurer to the seller at the rate of two (2) percent in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay....*

*...Article 13: Change in Law*

*13.1 Definitions*

*In this Article 13, the following terms shall have the following meanings*

*13.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline:*

*(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal or any law or*

*(ii) a change in interpretation of any law by a competent court of law, tribunal or Indian governmental instrumentality provided such court of law, tribunal or Indian governmental instrumentality is final authority under law for such interpretation but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the seller, or (ii) Change in respect of UI charges or frequency intervals by an Appropriate Commission.*

*13.2 Application and principal for computing impact of Change in Law*

*While determining the consequence of Change in Law under this Article 13, the parties shall have due regard to the principle that the purpose compensating the party affected by such Change in Law, is to restore through monthly tariff payments to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.*

*...b) Operation Period-*

*As a result of Change in Law, the compensation for any increase / decrease in revenues or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the parties, subject to right of appeal provided under applicable law and effective from the date specified in 13.4.1*

*13.3 Notification of Change in Law:*

*13.3.1 If the seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

*13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 13.3.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material. Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the seller.*

*13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:*

*a) The Change in Law; and*

*b) The effects on the Seller of the matters referred to in Article 13.2.*

*13.4 Tariff adjustment payment on account of Change in Law*

*13.4.1 subject to Article 13.2, the adjustment in monthly tariff payment shall be effective from:*

*(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law, or*

*(ii) the date of order/ judgment of the competent court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of law.”*

3.6. MSEDCL has signed PPAs with bidders under the Case1 Stage 2 bidding process as follows:

- i.) PPA dated 17/03/2010 with GMR Warora Energy Ltd. ('GMR') (formerly EMCO Energy Ltd.) for 200 MW at the levelised tariff of Rs. 2.88 per unit from its Warora Project.
- ii.) PPA dated 22/04/2010 for 450 MW and PPA dated 05/06/2010 for 750 MW with RattanIndia Power Ltd. ('RPL') (formerly Indiabulls Power Ltd.), both at the levelised tariff of Rs. 3.26 per unit from its Amravati Project.
- iii.) PPA dated 31/03/2010 for 1200 MW, PPA dated 09/08/2010 for 125 MW and PPA dated 16/02/2013 for 440 MW with APML, all at the levelised tariff of Rs. 3.28 per unit from its Tiroda Project.

3.7. MSEDCL had submitted a Petition for approval of these PPAs under Section 63. Vide Order dated 28 December, 2010 (Case No. 22 of 2010), the Commission approved the PPA of GMR for 200 MW, RPL for 1200 MW and APML for 1200 MW. The Commission also approved the PPA of APML for 125 MW vide Order dated 14 May, 2011 (Case No. 56 of 2010) and for 440 MW vide Order dated 27 December, 2012 (Case No. 53 of 2012).

3.8. The power supply against these PPAs, except 440 MW under the APML PPA, has commenced. The Scheduled Delivery Date (SDD) of the APML 440 MW PPA is 16 February, 2017. However, MSEDCL and APML have a Memorandum of Understanding (MoU) incorporating some terms and conditions for early power supply

and have jointly submitted a Petition before the Commission. [That joint Petition has since been withdrawn.]

3.9. The relevant provisions of the above PPAs read as follows:

*“Article 1: Definitions and Interpretation*

*Change in Law - shall have the meaning ascribed thereto in Article 10.1.1 of this agreement...*

*Indian Governmental Instrumentality – shall mean the Government of India, Governments of state(s) of Maharashtra, and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer...*

*Late Payment Surcharge - shall have the meaning Ascribe thereto an Article 8.3.5 of this Agreement.*

*Law - Shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate commission...*

*SBAR - Shall mean the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.*

*...Article 8: Billing and Payment*

*...8.3.5 In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such procurer to the seller at the rate of two (2) percent in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each date of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.*

*...Article 10: Change in Law*

*10.1 Definitions*

*In this Article 10, the following terms have the following meanings*

10.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in interpretation or application of any law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- the imposition of requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms of conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) Change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability...

## 10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the parties shall have due regard to the principle that the purpose compensating the party affected by such Change in Law, is to restore through monthly tariff Payment, to the extent contemplated in this Article 10, the affected party to the same economic position as if such Change in Law has not occurred...

## 10.3 Relief for Change in Law

### ...10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

### 10.4 Notification of Change in Law:

10.4.1 If the seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.

*10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the procurer contained herein shall be material.*

*Provided that in case the seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.*

*10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide , amongst other things, precise details of :*

- a) The Change in Law; and*
- b) The effects on the Seller.*

*10.5 Tariff Adjustment Payment on account of Change in Law*

*10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:*

- (i) the date of adoption, promulgation, amendment, re-enactment, repeal of the Law or Change in Law, or*
- (ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

*10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed tariff.”*

### RBI Guidelines/Circulars

- 3.10. The RBI introduced the Benchmark Prime Lending Rate (BPLR) system from 2003. On 9 April, 2010, RBI issued Guidelines on the Base Rate and Master Circular on 1 July, 2010. RBI stated that the BPLR system introduced in 2003 fell short of its original objective of bringing transparency to lending rates. This was mainly because, under the BPLR system, Banks could lend below the BPLR. For the same reason, it was also difficult to assess the transmission of policy rates of the RBI to the lending rates of Banks. Accordingly, Banks were advised to switch over to the system of Base Rate from 1 July, 2010. The Base Rate system aimed at enhancing transparency in lending rates of Banks and enabling better assessments of transmission of monetary policy.
- 3.11. As per these Guidelines/ Circular, the Base Rate system replaced the BPLR system from 1 July, 2010 and all categories of loans were to be priced only with reference to the Base Rate. However the loans to the categories (a) DRI advances (b) Loan to



Banks' own employee and (c) loan to Banks' depositors against their own deposits could be priced without reference to the Base Rate.

- 3.12. The RBI has issued fresh directions called the RBI (Interest Rate on Advances) Directions, 2016 vide Master Direction dated 3 March, 2016. The directions state that all rupee loans sanctioned and credit limits renewed with effect from 1 April, 2016 shall be priced with reference to the Marginal Cost of Funds Based Lending Rate (MCLR), which will be the internal benchmark for such purposes.
- 3.13. The State Bank of India (SBI) is publishing Base Rate (Historical Data) with effect from 1 July, 2010 till date on the SBI website. From April 2016 onwards, SBI is also publishing its MCLR rates. At present, the applicable Base Rate is 9.30% p.a. and applicable MCLR rate is 9.10% p.a. SBI is also publishing the BPLR (Historical Data). At present the BPLR is 14.05% per annum.
- 3.14. As per the above Guidelines/ Circulars issued by RBI, the Base Rate system / MCLR system is introduced and is applicable for all new loans from the respective effective dates and for those old loans that come up for renewal. Existing loans based on the BPLR system may run till their maturity. In case existing borrowers want to switch to the new system before expiry of existing contracts, an option may be given to them on mutually agreed terms. Although RBI introduced the Base Rate for all floating rate loan products from 1<sup>st</sup> July, 2010, it has allowed old loans to continue until their maturity according to the same interest rate methodology at which they were approved. Thus SBI is publishing the BPLR only for the old loans which have not come up for renewal.
- 3.15. Under the Commission's Multi Year Tariff ((MYT) Regulations, 2011 (Regulations 35.3(b) and 35.4(b)), the rate of interest on working capital (IoWC) shall be equal to the State Bank of India Advance Rate (SBAR) as on the date on which the application for determination of tariff is made. Further, as per Regulation 13.9 of the MYT (Third Amendment) Regulations, 2011, for computation of the Fuel Adjustment Cost (FAC) component of Z- factor charge, the component 'C' is the carrying cost for any under recovery/ over recovery on account of change in fuel cost of own generation and cost of power purchase, computed at the SBAR prevailing at the beginning of the month.
- 3.16. As per Regulations 31.1 (f), 31.2 (b) and 31.3 (b) of the MYT Regulations, 2015, the rate of IoWC shall be on a normative basis and equal to the Base Rate as on the date on which the Petition for determination of tariff is filed, plus 150 basis points. This is subject to the proviso that, for the purpose of Truing-up for any year, IoWC shall be allowed at the rate equal to the rated average Base Rate prevailing during the relevant year, plus 150 basis points.

3.17. Further as per the MYT Regulations, 2015, for computation of FAC component of Z-Factor charge, the component C is the carrying cost for any under recovery / over Recovery, computed at the Base Rate prevailing at the beginning of the month, plus 150 basis points. Thus, the Commission has also replaced the SBAR system with the Base Rate system in its fresh MYT Regulations, 2015.

3.18. As per Section 21(2) of the Banking Regulation Act, 1949,

*“Without prejudice to the generality of the power vested in the Reserve Bank under sub-section (1), the Reserve Bank may give directions to banking companies, either generally or to any banking company or group of banking companies in particular, as to –*

*...(e)the rate of interest and other terms and conditions on which advances or other financial accommodation may be made or guarantees may be given.”*

Further, as per Section 21 (3), every banking company shall be bound to comply with any directions given to it under this Section.

3.19. The BPLR system was introduced in 2003. Banks have to charge interest on loans in accordance with the directives issued by RBI from time to time. The interest prescribed or delay in payment clause incorporated in the PPAs was based on the prevailing rate at that time and the system enforced as per the directives of RBI. RBI is constituted as per Section 3 of the RBI Act, 1934 for the purpose of carrying on the business of Banking in accordance with the provisions of the Act. Thus, being a Governmental Instrumentality, its orders, notifications and circulars are ‘laws’ as defined in the PPAs, and it has now issued new Guidelines/ Circulars. As per these Guidelines/ Circulars, the Base Rate system replaced the BPLR system from July, 2010. Thereafter, the Base Rate system has now been replaced with MCLR w.e.f. April 01, 2016. Thus, the BPLR system incorporated in the PPAs has to be replaced by the Base Rate system / MCLR system for their respective application periods. The replacement of BPLR with Base Rate and Base Rate with MCLR by RBI, being a Governmental Instrumentality, is covered under the Change in Law provisions of the PPAs.

3.20. Notice of Change in Law:

As per the provisions of the PPA quoted above, it is the obligation of the Seller to serve a Notice of Change in Law to the Procurer if it is either affected or benefited by such Change in Law. In case the Seller has not provided such Notice, the Procurer has the right to issue such Notice to the Seller.

3.21. MSEDCL has not received such Notice from any of the IPP power suppliers for the events of Change in Law mentioned in the Petition. Hence, MSEDCL has served a

Notice for the Change in Law on the following IPP power suppliers on 23 September, 2016:

- a) APML for the PPAs of 1320 MW, 1200 MW and 125 MW
- b) RPL for 750 MW and 450 MW.
- c) GMR for 200 MW
- d) JSW for 300 MW
- e) Coastal Gujarat Power Ltd. (CGPL)

3.22. Replies to the Notice of Change in Law

In response to the Notice, JSW, CGPL and RPL have replied as under:

- a) CGPL: CGPL has stated that issuance of Master Circular / Directions dated 11 July, 2010 and 3 March, 2016 by RBI does not amount to Change in Law in terms of Article 13 of the PPA, and requested MSEDCL to withdraw the Notice.
- b) RPL: RPL has stated that, although RBI had changed BPLR to Base Rate vide its Circular dated 1 July, 2010 w.e.f. that date, it stipulated that Banks may continue to notify the BPLR from time to time so as to enable existing loans on BPLR to run till their maturity. The RBI Circular dated 3 March, 2016 stated that existing loans and credit limits linked to the Base Rate / BPLR shall continue till repayment or renewal as the case may be provided that the existing borrower shall have the option to move to the MCLR linked loans at mutually acceptable terms. As such, RPL has stated that there is no Change in Law as the SBI PLR exists as on date and it is still being used by Banks for existing loans.
- c) JSW: JSW has denied the contention of MSEDCL, stating that there is a complete and independent mechanism agreed under the PPA in case of absence of SBI PLR and no recourse can be had to the Change in Law provision of the PPA in this respect. Further, since the PLR is being published regularly by SBI, the question of application of any other rate for calculating the interest on delayed payments does not arise in the present case. Even in the absence of the SBI PLR, it is for the parties to mutually agree on its substitution with any other arrangement. JSW disagrees that the RBI directives have completely abolished PLR and wholly substituted it with the Base Rate system w.e.f. 1 July, 2010 and MCLR from 3 March, 2016 for all purposes and intent, and there are contracts which are saved and are still governed by the PLR system.

3.23. MSEDCL has not received replies from APML and GMR.

3.24. In MSEDCL's view, the reasons given by the parties in support of their contentions are not consistent with the true intentions of the RBI notifications and are also

contrary to the Regulations of the Commission referred to earlier. Hence, their contentions are not acceptable to MSEDCL.

3.25. If the SBAR system is not replaced by the Base Rate system and the MCLR system as prescribed by RBI, it will cause unjust enrichment of the Generators and injustice to the common consumers and MSEDCL.

3.26. In the circumstances, the present Petition is filed under Section 86 of EA, 2003 read with Article 13 (Change in Law) of the PPAs under Case 1 Stage 1 and Article 10 (Change in Law) of the PPAs under Case 1 Stage 2.

4. In its Reply dated 14 March, 2017, APMML has stated as follows:

4.1. MSEDCL has requested the determination of LPS at the rate of 2% above the applicable Base Rate per annum on the outstanding payment calculated on a day to day basis for each day of the delay against the PPAs, from 1<sup>st</sup> July, 2010 till 31<sup>st</sup> March, 2016; and from 1<sup>st</sup> April, 2016 at 2 %above the applicable rate under MCLR system.

4.2. The claim of MSEDCL that issuance of RBI Guidelines is a Change in Law is incorrect since the PPAs provide for payment of LPS at the SBAR defined as

*“the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.”*

Since the SBI PLR is still continuing, the issuance of RBI Guidelines is not a Change in Law in terms of the PPA.

4.3. APMML’s issue-wise response to the Petition is as follows:

I. RBI Guidelines are Change in Law events as per the PPAs, and SBI PLR is required to be replaced by Base Rate/MCLR System for determination of the rate of Late Payment Surcharge

a) MSEDCL’s claim of the revisions in the RBI Guidelines being Change in Law events is based on an incorrect understanding of the PPA provisions. Articles 11.3.4 and 11.3.5 of the 2008 PPA as well as Articles 8.3.5 and 8.3.6 of the 2010 and 2013 PPAs provide that Late Payment Surcharge (LPS) shall be applicable at the State Bank Advance Rate (SBAR) in case of delay in payment:

2008 PPA:

*“Article 11.3.4:*

*In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date month billing, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay.”*

#### 2010/2013 PPAs

*“Article 8.3.5:*

*In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of two percent (2%) in excess of tile applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.”*

- b) Thus, the PPAs stipulate that the LPS for delay in payment by the Procurer shall be 2% above the applicable SBAR per annum on the outstanding payment. ‘SBAR’ has been defined as the SBI PLR applicable for loans with one year maturity as fixed from time to time:

#### 2008 PPA

*“Article 1: Definitions and Interpretation*

*...SBAR- means the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.”*

#### 2010/2013 PPAs

*“Article 1: Definitions and Interpretation*

*...SBAR- Shall mean the prime lending Rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the parties.”*

- c) It is clear from the above definitions that only in the absence of SBI PLR can the SBAR be determined through any other arrangement that substitutes such PLR as mutually agreed to by the Parties. However, SBI has been notifying the PLR from time to time and it is in existence even today. Therefore, as per the provisions of the PPAs, the need for any other arrangement does not arise. In this context, it may be mentioned that SBI has reduced the PLR to 14% w.e.f. 1<sup>st</sup> January, 2017 as against 14.05% applicable till December, 2016.

- d) In the light of the above, the Petition filed by MSEDCL is not maintainable on this ground alone. The RBI Circulars relied upon by MSEDCL do not in any manner indicate that the SBI PLR is abolished or would be absent for the future period. The RBI Circular clearly indicates that SBI PLR will be in existence and shall be applicable for the existing loans. MSEDCL is not entitled to invoke the provisions of Change in Law in this regard.
- e) The provisions of the PPAs have been designed to ensure that any delay in timely payments does not take place. However, if such delay occurs, the PPAs provide for appropriate recourse in terms of LPS so as to penalise and discourage delayed payments and ensure appropriate compensation to the Seller. The LPS acts as a reimbursement to compensate the Seller towards any additional working capital interest incurred due to delay in payment by the Procurer. As a result, the payment towards LPS becomes applicable only on default of MSEDCL in meeting timelines relating to payment.
- f) Further, it does not result in any additional expenditure/income to APML. LPS cannot be considered as additional revenue since it is only reimbursement of the additional working capital interest incurred by the Respondent consequent to delay in payment by MSEDCL. MSEDCL's intention of delaying payments is evident from its non-adherence to the payment security mechanism under the PPAs. For safeguarding the Seller from any such additional cost on account of possible delay by the Procurer, the PPAs provide for a payment security mechanism in form of an irrevocable and revolving monthly Letter of Credit (LC) and creation of Escrow. However, the payment security mechanism in accordance with the PPAs is not being ensured by MSEDCL. Thus, MSEDCL has not only been delaying payments of Monthly/Supplementary Bills but also has not complied with the PPA provisions relating to payment security mechanism.

II. Continuation of the SBAR will cause unjust enrichment of the Generators and injustice to common consumers and MSEDCL:

MSEDCL's claim is totally baseless and is an attempt to hide MSEDCL's fault in making timely payments. As stated above, the payment of LPS arises only when there is delay in payment by MSEDCL and such payment of LPS does not in any manner result in unjust enrichment of the Generators as it is only a compensation for time value of the money and covers the additional working capital interest incurred by the Generators due to default by the Procurer.

III. MSEDCL did not receive any reply from APML to the Notice for Change in Law issued on 23<sup>rd</sup> September, 2016.

In fact, APML had denied the claim of MSEDCL vide letter dated 16 December, 2016. It had also annexed a letter of SBI Capital Markets Ltd. regarding the applicability of SBI PLR to its existing loans, which also states that the SBI PLR is still in operation.

5. In its Reply dated 29 March, 2017, JSW has stated as follows:
  - 5.1. To substantiate its claim under the Change in Law provisions of the PPAs approved under Section 63 of the EA, 2003, MSEDCL has incorrectly relied upon various Tariff Regulations dealing with IoWC and calculation of carrying costs, etc. which are made under section 62 by the Commission. The payment of interest on delayed principal payments between MSEDCL and the JSW is governed by the terms of the PPA and not the MYT Tariff Regulations, 2015.
  - 5.2. In effect, MSEDCL is calling upon the Commission to permit it to carry out a unilateral amendment to the provisions of the PPA, which revision can only be carried out with the mutual consent of the Parties. The Petition deserves to be dismissed as MSEDCL wants the Commission to re-write the terms of the approved PPA which, as per settled law, cannot be permitted.
  - 5.3. MSEDCL has time and again certified the interest amount due and payable to JSW at various dates. MSEDCL in accordance with Article 11.3.1 of the PPA, has already appropriated the admitted amount of interest, and sent its statement of the principal outstanding. MSEDCL cannot at this stage urge a retrospective amendment to the PPA, setting at naught its earlier admissions based on which interest has already been appropriated.
  - 5.4. Without prejudice to the above, the claim of MSEDCL, to the extent that it relates to the period prior to 2 December, 2013, is barred by limitation. MSEDCL's claim pertains to a cause of action which, as per the Petition, arose on 9 April, 2010, being the date of the RBI Circular introducing the Base Rate regulations. Determination of a dispute of this nature is an exercise of judicial function of the Commission and does not fall within its administrative or regulatory functions. In this regard, the Supreme Court in the case of AP Power Coordination Committee v. Lanco Kondapalli [AIR 2016 SC 1925] has observed that

*“...we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation...We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under Clause (f) of subsection (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.”*

In view of the above, given that the reliefs sought under the Petition pertain to a monetary claim which would not be recoverable before an ordinary Court or Arbitration due to the bar of limitation, they should not be allowed in the present case as per the principle set out by the Supreme Court. The Regulations in respect of Base Rate were well within the public domain and accessible by MSEDCL, and yet MSEDCL did not raise any objection on this issue for over 6 years and made payments at the LPS contractually agreed in the PPA.

5.5. Article 11.3.4 of the PPA provides that:

*“In the event of delay in payment of the Monthly Bill by the Procurer beyond its Due Date monthly billing, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of Two (2) percent in excess of applicable SBAR per annum, on amount outstanding payment, calculated on day to day basis (and compounded with Monthly rest), for each day of delay.”*

5.6. Further, Article 1 of the PPA defines SBAR as under:

*“SBAR means the prime lending rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In absence of such rate, any other arrangement that substitutes such prime lending rate as mutually agreed by the Parties.”*

5.7. It is clear from these provisions that the PPA provides for a contractually agreed mechanism for determination of rate of LPS without reference to any RBI Circulars or Guidelines, including in an event where the agreed benchmark for calculation of LPS is not available. Since the rate of LPS was never determinable on the basis of any Circular/Guidelines issued by the RBI, the RBI Guidelines/regulations do not apply to the PPA, including for the purpose of determination of LPS, and a change in these Guidelines/regulations cannot, therefore, lead to a Change in Law under the PPA. Therefore, the purported claim of MSEDCL as to occurrence of a Change in Law due to issuance of the Base Rate Regulations and MCLR Regulations by the RBI is of no relevance and the question of Change in Law does not arise.

5.8. It is also apparent from the Guidelines/Circulars issued by RBI that there are contracts which are saved and continue to be governed by the PLR system, including existing loans based on the BPLR system which have been permitted under the Guidelines and Circulars to run till their maturity.

5.9. In reply to the Notice dated 23 September, 2016 purportedly issued under Article 13 of the PPA by MSEDCL, JSW, vide its letter dated 3 October, 2016 has communicated the agreed contractual position under the PPA as regards determination of LPS. It further informed MSEDCL that its purported exercise of the right under Article 13.2 is not in accordance with the terms of the PPA and asked MSEDCL to



withdraw its Notice.

5.10. The terms and conditions of the PPA relating to Change in Law read as follows:

*“Article 13.1.1 Change in Law means the occurrence of any of the following events after the date, which is seven (7) days prior to the bid deadline:*

*(i) the enactment, bringing into effect, adoption, promulgation, amendment modification, or repeal of any law or (ii) a change in interpretation of any law by a Competent Court of law, tribunal or Indian Instrumentality is final authority under law for such interpretation.....”*

Article 13.2 deals with Application and Principles for computing the impact of Change in Law:

*“While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principles that purpose of compensating the Party affected by such Change in Law, is to restore through the Monthly Tariff payments to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law not occurred.”*

Article 13.2 (b) of the PPA states that:

*“As a result of Change in Law, the compensation for any increase/decrease in revenue or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to right to appeal provided under the applicable Law and effective date specified in 13.4.1,*

*Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenue or cost to the Seller is in excess of an amount equivalent 1% of the Letter of Credit in aggregate for a Contract Year.”*

5.11. Without prejudice to the earlier submissions, it is also submitted that, assuming argue do that issuance of RBI Guidelines is a Change in Law under the PPA, while determining the consequences of Change in Law under Article 13 of the PPA, the principle to be applied is to restore the Parties affected to the same economic position as if such Change in Law has not occurred. The case of MSEDCL is that the LPS should be determinable on the basis of the Base Rate and MCLR for the relevant periods in the event of delay in payment under the PPA, and that LPS should be payable at 2% percent above the applicable rate under the Base Rate system or the MCLR system from the respective dates of issue of the Base Rate Regulations and MCLR Regulations. If the Commission accedes to such request, JSW would be the affected Party due to decrease in its receivables under the PPA to the extent of reduction in the rate of LPS caused by the RBI Guidelines, and therefore, JSW would be entitled to compensation as the party adversely affected by Change in Law of an

amount required to restore it to the same economic position as though such Change in Law had not occurred.

6. In its Reply dated 24 April, 2017, RPL has stated that:
  - 6.1. On 23 September, 2016, MSEDCL issued a Notice under Section 10 of the PPAs alleging that issuance of the Base Rate regulations and MCLR Regulations by RBI constitute Change in Law events in terms of the PPAs. On 19 October, 2016, RPL rejected MSEDCL's claim for Change in Law.

### I. Limitation

- 6.2. MSEDCL's cause of action allegedly arose on 09 April, 2010, when the RBI issued Guidelines qua the Base Rate system. MSEDCL has filed the present Petition after considerable delay and it is barred on account of delay and laches. The RBI Circulars/ Guidelines qua Base Rate have been in existence since 2010 and were well within the knowledge of MSEDCL. Despite that, MSEDCL continued to make payments of LPS under the PPAs and acknowledged the outstanding dues payable to RPL, without any demur.
- 6.3. The reliefs sought by MSEDCL cannot be allowed by the Commission, since these would be otherwise barred by limitation prescribed for an ordinary suit before a civil court. In this regard, the Judgment dated 16.10.2015 of the Supreme Court in AP Power Coordination Committee vs. Lanco Kondapalli Power Limited reads as follows:

*“30. ...Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”*

31. ....it would be fair to infer that the special adjudicatory role envisaged under Section 86(1)(f) also appears to be for speedy resolution so that a vital developmental factor — electricity and its supply is not adversely affected by delay in adjudication of even ordinary civil disputes by the civil court. Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. Hence we hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court. But in an appropriate case, a specified period may be excluded on account of the principle underlying the salutary provisions like Section 5 or Section 14 of the Limitation Act. We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect of its judicial power under clause (f) of sub-section (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions which may be administrative or regulatory.”

II. Change in PLR to Base Rate and MCLR is not a Change in Law event

6.4. Article 10 of the PPA may be referred to, in particular Articles 10.1.1, 10.2.1 and 10.3.2 [which have been reproduced at para. 3(10) earlier in this Order].

6.5. In terms of Article 10.1.1, in order for an event to qualify as a Change in Law, the following conditions have to be met:

(a) It has to be an event which is covered under the bullet points of Article 10.1.1 of the PPAs;

(b) It has to be an event which has occurred after the Cut-off Date, which is 31.07.2009 (i.e., seven days prior to the Bid Deadline – 07.08.2009); and

(c) It has to be an event which results in any additional recurring/non-recurring expenditure or income.

6.6. In terms of Article 8.3.5 of the PPA, SBAR is to be considered if MSEDCL delays payment of monthly bills. This is in the nature of interest/ disincentive to ensure that there is no default/ delay in payment of Monthly Invoices. Evidently, LPS is neither income nor expenditure. Therefore, it does not fulfil the conditions and does not amount to a Change in Law Event under the PPAs, as contended by MSEDCL.

6.7. Without prejudice to the above, MSEDCL’s claim of Change in Law due to introduction of the Base Rate system and MCLR Regulations is incorrect. In this regard, Article 8.3.5 of the PPAs dealing with LPS is noteworthy:-

“8.3.5 In the event of delay in payment of a monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of two percent (2%) in excess of the

*applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.”*

- 6.8. In terms of Article 8.3.5, the methodology for determining the quantum of LPS (i.e., 2% above the applicable SBAR p.a.) payable by MSEDCL has been agreed to under the PPA without reference to any specific Circular and/or Guidelines issued by RBI in that regard. Further, the PPA also provides for a situation in which the SBAR rate is not available. Therefore, notwithstanding the shift from BPLR to Base Rate to MCLR, the parties continue to be bound by the provisions of the PPA. Even otherwise, the parties have agreed and recorded that they shall mutually agree on an arrangement in the event the SBAR rate is not available, thereby consciously excluding intrusion by the Commission qua the rate to be applied while calculating LPS.
- 6.9. Considering that the methodology for determining the quantum of LPS was never linked to any particular Circular and/or Guideline of RBI, the purported claim of MSEDCL that the issue of the Base Rate regulations and thereafter the MCLR Regulations by RBI constitutes Change in Law under the PPAs is erroneous. MSEDCL is seeking to reduce its financial implications arising out of the PPA provisions relating to non-performance of its obligations to pay Monthly Invoices in a timely manner. Article 8.3.5 is aimed at ensuring timely payment, and therefore, MSEDCL's contentions are devoid of merit.

### III. MSEDCL is seeking amendment of the PPAs, which is impermissible

- 6.10. MSEDCL has filed this Petition under the garb of seeking relief for Change in Law under the PPAs. However, it is seeking to amend the terms of the PPAs unilaterally, which is not permissible.
- 6.11. As per the definition of “SBAR” reproduced below, it is evident that, in the absence of SBAR rate/ BPLR system, the Parties shall mutually agree to substitute SBAR (PLR) with any other arrangement:

*“SBAR” shall mean the prime lending rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the Parties;”*

- 6.12. It is, therefore, clear that SBAR cannot be unilaterally amended/ replaced by MSEDCL and/ or through the Commission under the garb of seeking relief of alleged Change in Law. Article 15.3 specifically provides that the PPA may only be amended or supplemented by a written agreement between the Parties and after obtaining the

approval of the Commission, where necessary. In the light of the above, the present Petition deserves to be dismissed.

- 6.13. RBI continues to publish the BPLR. Evidently, the SBI's BPLR exists as on date and it is still being used by the Banks/ lenders for existing loans. Therefore, the BPLR rate is available for the computation of LPS.

#### IV. Retrospective adjustment of LPS is impermissible

- 6.14. Under the garb of Change in Law MSEDCL is with mala fide intent seeking re-computation of LPS already levied upon it (for the period between July to March, 2010) by RPL in terms of the provisions of the PPAs. MSEDCL has not disputed any Monthly Bills and/or Supplementary Bills as per the procedure prescribed under the PPAs. As such, they have become final and conclusive. Re-computation of already fructified amounts, legally due and payable by MSEDCL to RPL in terms of the PPAs, is not permissible in law. Even otherwise, a part of MSEDCL's claim is barred on account of delay and laches.
- 6.15. MSEDCL has consistently failed to pay the Monthly and Supplementary Bills to RPL in a timely manner, in terms of the PPAs. Accordingly, RPL has raised Supplementary Bills (on a monthly basis) upon MSEDCL claiming LPS, which remains unpaid. Therefore, MSEDCL now cannot be permitted to resile from its past admissions and seek retrospective amendment to the PPAs under the garb of claiming Change in Law.
- 6.16. RPL has filed a Petition (Case No.138 of 2015) seeking directions to MSEDCL to pay Rs.558.11 crore (which has now increased to Rs. 856.54 crore) towards the outstanding amounts for supply of power. The Petition is pending before the Commission. In the light of the above, MSEDCL at this stage cannot be permitted to wriggle out of its past admissions qua the outstanding amounts, including LPS legally payable to RPL in terms of the PPAs.
7. In its Reply dated 28 April, 2017, GMR has stated as follows:
  - 7.1. MSEDCL had admittedly executed separate and distinct PPAs with each the Respondents individually, including GMR. It has been expressly admitted that each of these PPAs, including the GMR PPA, are distinct, separate and independent of the other PPAs executed by MSEDCL. Even though the event leading to the filing of the present Petition against various Respondents is the same, each PPA gives rise to a separate cause of action. There is no basis under any law and/ or regulations which entitles MSEDCL to club various causes of action against unrelated Respondents and raise them in one common Petition. Therefore, the Petition is bad for misjoinder of parties and is liable to be dismissed on this ground alone.

- 7.2. MSEDCL has sought that the LPS payable in terms of the GMR PPA should be computed at 2% above the applicable Base Rate. Article 8.3.5 provides that the LPS shall be computed at 2% above the PLR applicable to loans with one year maturity as fixed by SBI from time to time.
- 7.3. MSEDCL has not prayed for any relief as provided under the GMR PPA for an event of Change in Law. MSEDCL has cited the provisions of the PPA relating to “Change in Law” and has sought amendment of the terms of the PPA relating to the LPS which has been approved by the Commission.
- 7.4. The provisions of the PPA dealing with ‘Change in Law’ do not contemplate amendment of the terms and conditions of a PPA in the event of a Change in Law. MSEDCL cannot on its accord seek amendment of the terms of the GMR PPA. In any event, amendment/ modification to the terms and conditions of a PPA cannot be granted as a relief under the provisions relating to Change in Law.
- 7.5. MSEDCL is obligated to seek amendment to the provisions of the PPA only in accordance with the agreed procedure for amendment of its terms.
- 7.6. The power generated from GMR’s Power Plant is being supplied to the States of Maharashtra and Tamil Nadu and the Union Territory of Dadra and Nagar Haveli pursuant to the following PPAs:
- (a) 200MW of power on long term basis under PPA dated 17.03.2010 with MSEDCL
  - (b) 200 MW on long term basis in terms of PPA dated 21.03.2013 with the Electricity Department of the Union Territory of Dadra and Nagar Haveli; and
  - (c) 150 MW on long term basis to Tamil Nadu Generation and Distribution Corporation Limited through GMR Energy Trading Ltd. in terms of a back to back arrangement.
- 7.7. Thus, the Power Plant of GMR has a scheme for the sale of power to more than one State. As such, in accordance with Section 79 (1) (b) of the EA, 2003, the Appropriate Commission for the adjudication of the issues raised by MSEDCL in this Petition is the Central Electricity Regulatory Commission (CERC) and not the State Commission. Section 79 (1) (b) of the EA, 2003 reads as follows:

*“Functions of Central Commission – (1) the Central Commission shall discharge the following functions, namely:*

*(b) To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*...(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*

7.8. Pursuant to the judgement of the Supreme Court in Energy Watchdog vs. CERC in C.A No 5399 of 2016 passed on 11 April, 2017, it is no longer *res integra* that in the event a Generating Company enters into supply of power in more than one State, the Appropriate Commission for adjudication of disputes between the contracting parties would be the CERC under Section 79 (1) (b) of the Act:

*“22. ...The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.”*

7.9. The present Petition having been filed before the State Commission is, therefore, not maintainable and liable to be dismissed on this ground alone.

7.10. Articles 10.1, 10.2.1, 10.3.1 to 10.3.3, 10.5.1 and 10.5.2 relating to Change in Law and the reliefs available to the affected party are of particular reference [and may be referred to at para. 3(10) earlier in this Order]. From these provisions, it is evident that

- (i) a “Change in Law” should result in a recurring/ non-recurring increase in expense or decrease in revenue to the Generating Company; or should beneficially affect it;
- (ii) the relief available to offset the impact of Change in Law is by way of compensation so that the affected party is brought to the same economic condition as if such Change in Law had not occurred;
- (iii) With regard to its PPA, GMR is entitled to claim compensation subject to fulfilment of the minimum financial impact condition of 1% of the value of the LC; and
- (iv) the payment of the impact on the monthly tariff for the supply of power to MSEDCL will be through Supplementary Bills for past bills and the invoice to be raised in future shall be for the changed tariff.

7.11. In the alleged Change in Law, i.e. the RBI Guidelines relating to switch over from the PLR system to the Base Rate system, there is neither any benefit nor any decrease in revenue nor any increase in expense to GMR. Therefore, the Change in Law provision is not attracted. The RBI Guidelines are relevant only for purposes of calculation of the rate of interest payable in the event of delay by MSEDCL to make payment of tariff for the off-take of power. The reliance placed upon the Change in Law provisions of the PPA is therefore, misplaced and untenable.

7.12 Notwithstanding the fact that a switch-over has been made from BPLR to Base Rate System, SBI continues to notify the BPLR. Accordingly, the entire Petition is nothing but an attempt to renegotiate a binding PPA executed between the parties and approved by the Commission.

8. The proceedings at the hearing held on 2 May, 2017 are summarised as follows.

8.1 MSEDCL stated that

1) The Petition has been filed for recognition of RBI Notifications regarding change in banking rates as a Change in Law with regard to the PPAs. The RBI introduced the BPLR system from 2003. By subsequent Circular/Guidelines of RBI, the Base Rate system replaced the BPLR system from 1 July, 2010 and all categories of loans were to be priced only with reference to the Base Rate. SBAR and Change in Law are both defined in the Stage 1 and Stage 2 Competitive Bidding PPAs. The issue of change in the basis of rates is relevant to the rate applicable to delayed payments, i.e. LPS, under the PPAs.

2) RBI has issued directions on 3 March, 2016 stating that all rupee loans sanctioned and credit limits renewed with effect from 1 April, 2016 shall be priced with reference to the MCLR, which will be the internal benchmark for such purposes.

3) SBI is publishing Base Rate (Historical Data) from July, 2010 till date on its Corporate website. From April, 2016 onwards, SBI is also publishing MCLR rates besides the BPLR (Historical Data).

4) The Base Rate Guidelines and MCLR Guidelines are applicable for new loans and for those old loans that come up for renewal. The BPLR rate will continue for these old loans till their maturity. The provisions/directions of the Circulars apply to every scheduled commercial bank.

5) Regulations 35.3 (b) and 35.4 (b) of the MYT Regulations, 2011 are regarding the rate of IoWC which shall be equal to the SBAR as on the date on which the Application for determination of tariff is made. Further, as per Regulation 13.9 of the MYT (Third Amendment) Regulations, 2011, for computation of FAC component of Z-factor charge, the component 'C' is considered as the carrying cost for any under recovery/ over recovery on account of change in fuel cost of own generation and cost of power purchase, computed at the SBAR prevailing at the beginning of the month.

6) Now, as per Regulations 31.1 (f), 31.2 (b) and 31.3 (b) of the MYT Regulations, 2015, the rate of IoWC shall be on a normative basis and equal to the Base Rate as on the date on which the Petition for determination of tariff is filed, plus 150 basis points.



Thus, in the MYT Regulations, 2015, the Commission has adopted the Base Rate system.

## 8.2 APML stated that

1) BPLR is still in existence and SBI is publishing it regularly. Vide letter dated 14 March, 2017, APML has informed MSEDCL regarding the change in SBAR from 14.50% to 14.00% w.e.f January, 2017, and further from 14.00% to 13.80% w.e.f April, 2017. Only if BPLR does not exist is it required to come to the Commission with a mutually agreed rate.

2) The MYT Regulations are applicable only for the Tariff determined under Section 62 of the EA, 2003, whereas the PPA is signed under Section 63. Therefore, the Regulations are not relevant in this case. MSEDCL cannot pick and choose the Regulations from out of the MYT Regulations, which are for Section 62 PPAs.

## 8.3 JSW made the following submissions:

1) The MYT Regulations stipulate the LPS in terms of an absolute percentage figure as per Regulation 36.1, i.e., 1.25% per month, and the particular benchmark is specified. Also, under Regulation 36.3 of the MYT Regulations, 2015, LPS and Interest on Delayed Payment earned by the Generating Company or the Licensee shall not be considered under its Non-Tariff Income. MSEDCL has not sought amendment in or reopening of the PPAs, and hence the Petition may not be admitted.

2) MSEDCL has filed the Petition against 5 individual Generators who have independent and separate PPAs with it. As such, the Petition is not maintainable in its present form and suffers from the vice of misjoinder of Parties (both Stage 1 and Stage 2 Competitive Bidding PPAs having been included) and causes of actions.

3) MSEDCL has not sought amendment or modification of the PPA, and the effect of the Change in Law would be extraneous to the PPA. The definition of SBAR in the PPA states that, in the absence of SBAR, it shall be the rate mutually agreed by the Parties. However, MSEDCL has never approached it for such discussion and, while entering into the PPA, both parties agreed on the SBI PLR.

4) MSEDCL has admitted that the benchmark rates are still being published. As per Art 13.2 of the PPA, as a result of Change in Law, MSEDCL has to provide the details of any decrease in revenue or increase in expenses which shall be payable if it is in excess of 1% of the LC value in aggregate for the relevant Contract Year.

## 8.4 RPL stated that only events under Article 10.1.1 constitute Change in Law and the payments received due to Change in Law cannot be treated as income or expenditure for the Company arising out of the business. The fact is that MSEDCL is not even

paying for the power purchased. MSEDCL has been accepting the bills till date as per the PPA, and is now claiming Change in Law. That is now barred by limitation. Payment of LPS is not part of the normal course of transactions under the PPA, but in the nature of penal charges which arise only if the payments have not been made for the invoices by the due date. Hence, the rate applicable as interest for this event of default cannot be treated as Change in Law under the PPA. Under Art 8.3.5, LPS is payable at a rate of 2% above the applicable SBAR per annum.

8.5 GMR stated as follows:

1) GMR is an Inter- State Generator, and the jurisdiction of the CERC has already been decided in such issues in various Judgments, and the Commission may reject the Petition on the basis of maintainability.

2) MSEDCL has not included CGPL in this Petition, being an inter-State Generator, whereas GMR has been made a party. MSEDCL has not approached CERC for its claim of Change in Law for CGPL.

3) Article 10.2 of the PPA deals with the applicability and principles for computing the impact of Change in Law, and can be invoked only to compensate the affected party and restore it to the same economic position as if such Change in Law had not occurred. Moreover, the RBI Circulars are from 2010 but have not been raised by MSEDCL till now.

4) The PPA has been executed as per the Standard Bidding Documents issued by the MoP and cannot be amended or modified subsequently through a Change in Law Petition. Under Article 10.3.2 of the PPA, the compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if it is in excess of 1% of the value of the LC in aggregate for the relevant Contract Year.

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

**9. It is not disputed that the RBI is an Indian Governmental Instrumentality as defined in the PPAs; and that, consequent to the RBI Notifications set out in these proceedings, certain changes have been effected by RBI resulting in changes in the underlying basis of certain SBI benchmark rates relevant to the LPS, at least for new loans. However, the issue is whether or not these changes constitute Change in Law events for the purpose of compensating the affected party so as to restore it to the same economic position as before such Change in Law under the terms of the PPAs. In effect, MSEDCL is seeking that, for any LPS that has been paid by MSEDCL or has become due since the dates of those rate changes, the amount of difference between the SBAR as defined in the PPAs and those (lower) rates would have to be refunded by the Sellers to MSEDCL or cease to be due.**

10. The provisions of the two different sets of PPAs have been quoted earlier in this Order. The most relevant provisions are set out again below, and the portions of most significance underlined for emphasis:

1) One set of PPAs provides for LPS for delayed payments as follows (and is similar to the provision in the other PPAs):

*In the event of delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.”*

2) The ‘SBAR’ on which the LPS is based is defined as follows in one set of PPAs:

*“SBAR” means the prime lending rate per annum applicable for loans with one (1) year maturity as fixed from time to time by the State Bank of India. In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the Parties;”*

The definition of SBAR in the other set of PPAs is almost identical.

3) The relevant provisions of Article 10 of the Case 1 Stage 2 PPAs relating to the impact of Change in Law, the Notice to be given by the affected Party and the details to be provided read as follows:

*“Article 10: Change in Law*

*10.1 Definitions*

*In this Article 10, the following terms have the following meanings*

*10.1.1 “Change in Law” means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:...*

*10.2 Application and Principles for computing impact of Change in Law*

*10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose compensating the party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article*

10, the affected party to the same economic position as if such Change in Law has not occurred...

### **10.3 Relief for Change in Law**

#### **...10.3.2 During Operating Period**

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

#### **10.4 Notification of Change in Law:**

...10.4.2...Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide , amongst other things, precise details of :

a) The Change in Law; and

b) The effects on the Seller.

#### **10.5 Tariff Adjustment Payment on account of Change in Law**

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:

(i) the date of adoption, promulgation, amendment, re-enactment, repeal of the Law or Change in Law,...

10.5.2 The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed tariff.”

Article 13 of the other set of PPAs has substantively similar provisions, though the Case 1 Stage 2 PPAs quoted above are more elaborate in some respects.

11. Thus, the PPAs provide for LPS at a rate which is 2% above the SBAR. The SBAR is defined as the SBI PLR for one-year loans. MSEDCL has stated that, against the BPLR system in vogue from 2003 on which the SBAR was based, the RBI first introduced the Base Rate system from July, 2010, and thereafter replaced it with the MCLR system from April, 2016. MSEDCL contends that

a) these revisions constitute Change in Law events in terms of the PPAs; and that

b) the LPS be chargeable accordingly at 2% above the Base Rate from July, 2010 and 2% above the MCLR from April, 2016 onwards, instead of the current PPA provision.

The consequence would also be that, for any LPS that has been paid by MSEDCL since that date, if the LPS based on the SBAR is higher than that based on the subsequent revisions in reference rates by RBI, the amount of difference would have to be refunded by the Sellers to MSEDCL. Any LPS unpaid would also be governed by the rates based on the RBI revisions.

12. It is evident from the PPA provisions quoted above that not all changes in legal dispensations by a Governmental Instrumentality such as RBI amount to Change in Law events for the purposes of compensating the affected party in terms of the PPAs. For this purpose,

a) The Change in Law must result in additional recurring/ non-recurring expenditure by the Seller or any income to the Seller;

b) The compensation is for restoring, through monthly tariff payments, the affected party to the same economic position as if such Change in Law had not occurred

c) Any change in the Tariff by reason of Change in Law is to be reflected in the Monthly Bills raised by the Seller.

However, the LPS provision is attracted only when payments are not made by MSEDCL against the Monthly Bills of the Seller within the time stipulated in the PPAs. Any changes in the basis of the LPS rates consequent to revisions by the RBI do not affect in any manner the rates at which power was agreed to be sold and purchased under the PPAs and in the consequent financial implications for either Party resulting in a liability to compensate the affected Party. The LPS is essentially compensatory in character (as pointed out by the Supreme Court in several Judgments), in terms of the effect on the Seller on account of delay by MSEDCL (as the Procurer in this case) in making due payments. The additional liability of LPS on MSEDCL would also be expected to encourage timely payment and deter delay. Thus, the LPS is also entirely avoidable. The issue would not arise at all if MSEDCL pays its dues in time.

13. Moreover, while introducing the Base Rate system in 2010 and the MCLR system in 2016, the RBI has provided for the continuation of the earlier BPLR dispensation for existing loans. Consequently, the SBAR referred to in the LPS provision, which is the SBI PLR for loans with maturity of one year, remains in vogue and its value continues to be declared by SBI from time to time. Thus, in effect, no change has taken place that would affect the basis of the rate

underlying the LPS.

14. In view of the foregoing, the question of the RBI revisions amounting to Change in Law events in terms of the PPAs, or of any compensation on account of such purported Change in Law events in this regard, does not arise.
15. The PPAs provide that notices of Change in Law events are to be issued along with their precise effect by the Seller, failing which MSEDCL may do so. While the changes cited by MSEDCL were effected by RBI from July, 2010 and April, 2016 and notified in advance, MSEDCL issued Notices of Change in Law to the Respondents only in September, 2016, i.e. more than 6 years after RBI introduced the Base Rate system in place of the BPLR system. The Respondents have contended that the claim is barred by limitation. The Commission notes that the PPAs require that such claims be raised

*“as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.”*

MSEDCL could not have been unaware of the revision effected by the RBI at that time, nor has it explained this inordinate delay in raising its claim.

16. The Commission also notes that the PPAs with APML were signed in August, 2010 and February, 2013, after the RBI had introduced the Base Rate system. Nevertheless, MSEDCL chose to enter into these PPAs with the LPS provisions based on the SBI PLR.
17. In the guise of Change in Law events, MSEDCL is in effect seeking that the LPS provision for delayed payments in the PPAs be modified or read as based on the one-year SBI PLR from July, 2010, and on the one-year SBI MCLR from April, 2016 (which is lower than the SBAR referred to in the PPAs). In this context, the Commission notes that, since the SBI continues to notify the SBAR which determines the LPS rate, recourse cannot be had to the provision in the PPAs that

*“In the absence of such rate, SBAR shall mean any other arrangement that substitutes such prime lending rate as mutually agreed to by the Parties;...”*

Moreover, the Case 1 Stage 2 PPAs provide that

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

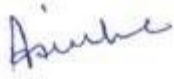
Article 18.1 of the other PPAs has a similar provision. However, none of the Respondents have agreed to the change in the LPS provision sought by MSEDCL.

18. The Commission also notes that the Respondent GMR is in fact inter-State Generators.

The Petition of Maharashtra State Electricity Distribution Co. Ltd. in Case No. 24 of 2017 stands disposed of accordingly.

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

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

  
**(Ashwani Kumar Sinha)**  
**Secretary**

